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2016 IL App (3d) 150015-U

Order filed September 8, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

JEFFREY POWELL,)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
Plaintiff-Appellee,)	Kankakee County, Illinois.
)	
v.)	
)	Appeal No. 3-15-0015
)	Circuit No. 13-MR-609
BOARD OF TRUSTEES OF THE)	
BOURBONNAIS POLICE PENSION FUND,)	Honorable
)	Adrienne W. Albrecht,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* Police pension board's determination that police officer was not entitled to line-of-duty disability pension was not against manifest weight of evidence where officer failed to present credible evidence of a specific act of duty he was performing when his injuries occurred.
- ¶ 2 Plaintiff Jeffrey Powell filed an application with defendant Board of Trustees of the Bourbonnais Police Pension Fund (Board) for a line-of-duty disability pension or, alternatively, a non-duty disability pension. The Board granted Powell a non-duty disability pension but denied

his request for a line-of-duty pension. Powell filed a complaint for administrative review, and the circuit court reversed the Board's decision denying him a line-of-duty pension. The Board appeals, arguing that its decision to deny a line-of-duty disability pension was not against the manifest weight of the evidence. We reverse the trial court's order and affirm the Board's decision.

¶ 3

FACTS

¶ 4

On June 8, 2000, Powell was hired as a patrol officer for the Bourbonnais Police Department. On September 17, 2007, when he was 43 years old and still working in the same position, he underwent surgery for a total left hip replacement. A few months later, he returned to his position as a patrol officer for the Bourbonnais Police Department. On March 22, 2010, he underwent surgery for a total right hip replacement and never returned to his employment with the Bourbonnais Police Department.

¶ 5

In June 2010, Powell filed an application with the Board requesting a line-of-duty disability pension. According to Powell's application, the dates of his injuries were September 17, 2007, and September 15, 2009. Powell indicated in his application that his left hip injury was "caused by repetitive use entering and exiting squad car." With respect to his right hip, Powell wrote: "following surgery on left hip overcompensated with right hip causing repetitive trauma." Powell later requested that his application be amended to include a request for a non-duty related disability pension.

¶ 6

Powell was examined by three physicians selected by the Board: Dr. Basel Al-Aswad, Dr. Leon Huddleston, and Dr. James Boscardin. Powell told Dr. Al-Aswad that he injured his left hip while jogging in April 2007, and that his right hip "began to give out" in September

2009, while he was carrying a five-pound bucket of dirt. Powell reported a history of gout to Dr. Boscardin.

¶ 7 The Board held a hearing on Powell's disability application. At the hearing, Powell testified that he began experiencing discomfort and pain in his left hip on December 10, 2006, following a foot chase with a suspect. He did not report the pain to anyone at the police department even though he was required to report job-related injuries. Powell first sought treatment for his pain six months later from his regular physician, Dr. Lauren Hana. Powell did not inform Dr. Hana of the December 2006 foot chase, nor did he mention it to Drs. Al-Aswad, Huddleston, or Boscardin when they examined him. Dr. Hana referred Powell to Oak Orthopedics for further evaluation.

¶ 8 Dr. Michael Corcoran of Oak Orthopedics examined Powell and ordered x-rays of his left hip in July 2007. At that time, Powell reported that he had been experiencing left hip pain for three weeks while walking or running but reported no traumatic injury. The x-ray of Powell's left hip showed moderate to severe degenerative disc disease with a cystic lesion throughout the uncovered aspect of the hip. Dr. Corcoran referred Powell to Dr. Milton Smit.

¶ 9 Dr. Smit first saw Powell on July 19, 2007, and diagnosed him with severe osteoarthritis of the left hip. He recommended that Powell have a total left hip replacement. On September 17, 2007, Dr. Smit surgically replaced Powell's left hip. After missing 13 weeks of work, Powell returned to full unrestricted duty on December 20, 2007. Dr. Smit continued to provide Powell with follow-up treatment for about two years.

¶ 10 Powell testified at the Board hearing that in December 2007 or January 2008, he injured his right hip when he slipped and fell on ice in the police department parking lot. He was on duty at the time but was not responding to a call or providing any police service. Powell did not

report the incident to his supervisor nor did he make a written report of the incident. He also did not report this incident to any medical professionals, including Drs. Smit, Al-Aswad, Huddleston, or Boscardin, when they examined him.

¶ 11 In April 2009, Powell informed Dr. Smit that he was experiencing pain and swelling in his right hip. Dr. Smit ordered x-rays of Powell's right hip, which showed moderate to mildly severe osteoarthritis. Dr. Smit treated Powell with medication and injections but told Powell he would eventually need a total right hip replacement. Powell continued to complain of pain in his right hip. On March 22, 2010, Dr. Smit surgically replaced Powell's right hip. Dr. Smit continued to provide treatment to Powell following the surgery and never released him to full unrestricted police duties.

¶ 12 Powell testified that before he began working with the Bourbonnais Police Department, he worked for the City of Kankakee Police Department from 1987 to 2000. From 1987 to 2007, he ran approximately two-and-a-half miles each day, five days a week, to stay in shape for his job as a police officer. The Bourbonnais Police Department requires active duty police officers to maintain good physical fitness.

¶ 13 As a patrol officer, Powell was required to wear a belt with a gun and holster, extra magazines, handcuffs, a baton, mace and a flashlight every day on his shift. Powell's belt weighed approximately 18 pounds. Powell also wore a bulletproof vest while on duty. Powell entered and exited his patrol car an average of 20 and 30 times per shift when he was on duty. His job as a patrol officer also required him to run after people and lift heavy items. Powell believed that the condition of his hips was aggravated by the following activities: (1) repeatedly entering and exiting his vehicle while wearing 18 pounds of equipment, (2) running after suspects, and (3) running to maintain physical fitness for his job.

¶ 14 When Powell initially developed osteoarthritis in his left hip, Dr. Smit did not believe it was related to his job, but after Powell developed osteoarthritis in both hips, Dr. Smit came to believe that Powell's activities as a police officer caused or contributed to his osteoarthritis. Dr. Smit opined that Powell's osteoarthritis was caused by his repeatedly entering and exiting a police car, running, moving, and lifting objects while carrying eight or more pounds of equipment on his body. Dr. Smit admitted that he did not know "the details of everything that [Powell] did" in his job as a patrol officer. He also did not know how many times Powell had to get in and out of his squad car on a daily basis, how often Powell had to run in his job, or how much weight Powell had to lift for his job. Dr. Smit believed that Powell's hip condition was not caused by a specific incident or incidents but by the high level of activities Powell generally performed as a police officer.

¶ 15 Dr. Al-Aswad testified that the pain Powell experienced while running, walking and entering and exiting his car were merely symptoms, not the cause of his hip condition. Dr. Al-Aswad opined that Powell's activities as a police officer, including wearing many pounds of gear on his belt, may have aggravated his condition. According to Dr. Al-Aswad, getting in and out of a car repeatedly on a daily basis is not an activity unique to police officers and would not cause more damage to Powell's hips than other everyday activities, like getting in and out of a chair, walking, and moving around. He stated that repeatedly entering and exiting a vehicle while wearing an 8 to 20-pound belt would have a "minimal impact" on Powell's osteoarthritis.

¶ 16 Dr. Huddleston opined that Powell's disability resulted from an aggravation of his preexisting osteoarthritis. He thought it was possible that Powell's work-related activities, including wearing a vest and belt, walking long distances, chasing suspects and going up and down stairs, aggravated his osteoarthritis. He did not believe the equipment Powell carried

caused his disability but thought that wearing a gun belt and getting in and out of a car repeatedly could have aggravated his hip condition. He noted that everyday activities, such as walking, lifting, and running, can also aggravate osteoarthritis.

¶ 17 Dr. Boscardin found no specific work-related injury or activity that resulted in or contributed to Powell's disability. He believed that gout was a possible causative factor of Powell's osteoarthritis. He did not believe that Powell's osteoarthritis and his need for total hip replacements were related to "any specific on the job event." Drs. Smit, Al-Aswad and Boscardin agreed that Powell was permanently disabled and would be unable to perform full unrestricted duties as a police officer.

¶ 18 The Board issued a written order granting Powell a non-duty disability pension but denying him a line-of-duty disability pension because his "disability was not caused by his performance of an act of duty." The Board found that "Powell was suffering from chronic and long term osteoarthritis and that there was no objective evidence to support the conclusion that any specific act of police service caused, exacerbated or aggravated his condition." The Board stated that while three physicians opined that Powell's repetitive police duties aggravated his condition, none of them identified any specific "act of duty" unique to police work. The Board did not accept Powell's testimony that his hip problems were caused by a foot chase with a subject or a fall on ice, finding "no credible evidence" that these alleged incidents caused or contributed to his disability.

¶ 19 Powell filed a complaint for administrative review in the circuit court. The court reversed the Board's decision to deny Powell a line-of-duty disability pension, finding it was against the manifest weight of the evidence. The court concluded that "the existence of the causal relationship between the need for hip replacement and the requirements of the Plaintiff's

work as a police officer is clearly evident.” The court relied on the case of *Alm v. Lincolnshire Police Pension Board*, 352 Ill. App. 3d 595 (2004), stating that it was “closely analogous.”

¶ 20

ANALYSIS

¶ 21

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 “[t]he 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). Rulings on questions of fact will be reversed only if they are against the manifest weight of the evidence. *Marconi*, 225 Ill. 2d at 534. 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.

¶ 22

The Board, as the finder of fact, is responsible for making credibility determinations and assigning weight to testimony and other evidence. *Lambert v. Downers Grove Fire Department Pension Board*, 2013 IL App (2d) 110824, ¶ 49. We do not weigh the evidence or substitute our judgment for that of the Board. *Id.* The Board, by virtue of its ability to actually observe the conduct and demeanor of witnesses, is in the best position to make credibility determinations. *Id.* A credibility determination by a pension board will often be dispositive. *Id.*

¶ 23

“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, it should be affirmed. *Id.*

¶ 24 Section 3-114.1 of the Illinois Pension Code (Code) provides that a police officer is entitled to a line-of-duty disability pension if he or she “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.” 40 ILCS 5/3-114.1 (West 2012). The Code defines “act of duty” as: “Any act of police duty inherently involving 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 a special assignment.” 40 ILCS 5/5-113 (West 2012).

¶ 25 That an officer is injured performing his assigned duties does not necessarily mean that he was injured during the performance of an “act of duty.” *Summers v. Retirement Board of the Policemen’s Annuity & Benefit Fund of the City of Chicago*, 2013 IL App (1st) 121345, ¶ 43. The officer’s injury must have been incurred in the performance of an act of duty inherently involving “special risk, not ordinarily assumed by a citizen in the ordinary walks of life.” *Id.* ¶ 44; 40 ILCS 5/5-113 (West 2012).

¶ 26 In determining whether an officer has been injured in “the performance of an act of duty,” we must focus on the capacity in which the officer was acting, rather than the precise physical act that caused the injury. *Summers*, 2013 IL App (1st) 121345, ¶ 41. An officer performing duties involving special risks will be entitled to line-of-duty benefits even if the immediate cause of the injury is an act involving only an ordinary risk. *Alm*, 352 Ill. App. 3d at 599.

¶ 27 An officer seeking a line-of-duty pension must present medical evidence showing that a specific, identifiable act of employment caused his disability. See *Coyne v. Milan Police Pension Board*, 347 Ill. App. 3d 713, 724 (2004). Where a disability results from the cumulative effect of duties an officer performs over his career as a police officer and not to a specific act of police service, the “act of duty” requirement is not satisfied. *Id.*; see *Trettenero v. Police Pension Fund of the City of Aurora*, 268 Ill. App. 3d 58, 63 (1994).

¶ 28 In order to obtain a line-of-duty disability pension, the “plaintiff must establish a causal connection between [his] condition and an act of police service.” *Ryndak v. River Grove Police Pension Board*, 248 Ill. App. 3d 486, 489 (1993). The 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 his 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 Board*, 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.

¶ 29 Powell testified at the Board hearing about a foot chase in December 2006 and a slip-and-fall in December 2007 or January 2008 that allegedly caused his hip injuries. The Board, however, rejected that testimony, finding “no credible evidence” that those alleged incidents caused or contributed to Powell’s disability because Powell failed to report them at work, did not mention the incidents to any of the doctors who treated or examined him, and did not report them on his disability application. Since the Board is in the best position to make credibility determinations and there was no medical evidence supporting Powell’s testimony that those two

incidents caused or contributed to his disability, the Board's finding that Powell's alleged foot chase and subsequent slip-and-fall did not cause or aggravate his hip problems was not against the manifest weight of the evidence.

¶ 30 Dr. Smit testified that Powell's injuries were caused by several activities that he performed as a police officer, including repeatedly entering and exiting his vehicle, running, lifting objects, and wearing a gun belt containing many pounds of equipment. The doctors chosen by the Board to examine Powell disagreed that any of those activities caused Powell's osteoarthritis. While Drs. Al-Asward and Huddleston agreed that Powell repeatedly entering and exiting a vehicle while wearing a belt containing eight or more pounds of equipment may have aggravated Powell's osteoarthritis, they testified that other everyday activities, such as walking, getting up from a chair, and moving around, would cause similar aggravation.

¶ 31 The medical evidence presented in this case established that no one specific, identifiable act performed by Powell during his police service caused his disability. Instead, Dr. Smit identified a variety of acts that cumulatively caused Powell's hip osteoarthritis. Even Powell himself failed to identify one specific act that caused his hip disorder, claiming that it was the result of his (1) repeatedly entering and exiting his vehicle while wearing 18 pounds of equipment, (2) running after suspects, and (3) running to maintain physical fitness for his job. Since Powell's injury developed as a result of multiple acts over time, not because of a single, specific act, Powell cannot satisfy the "act of duty" requirement of the Code. See *Coyne*, 347 Ill. App. 3d at 724.

¶ 32 The trial court relied on the case of *Alm v. Lincolnshire Police Pension Board*, 352 Ill. App. 3d 595 (2004), to support its decision to reverse the Board's judgment in this case. In *Alm*, the plaintiff was a bicycle patrolman who suffered a knee injury that was either caused or

aggravated by riding a bicycle on patrol. *Id.* at 601. The court ruled that “Plaintiff established that he incurred a disabling injury in the course of pedaling his bicycle” and stated that “[t]he real question, therefore, is whether pedaling the bicycle was an act of duty.” *Id.* The court concluded that the bicycle patrol plaintiff performed was an act of duty that entitled to him to line-of-duty benefits. *Id.*

¶ 33 Here, Powell’s injury is similar to that of the plaintiff’s in *Alm* since it developed over time and was not caused by any specific, identifiable, physical trauma. *See id.* However, unlike the plaintiff in *Alm*, who established that he incurred a disabling injury while performing the specific, identifiable act of “pedaling his bicycle” (*id.*), Powell has failed to identify any one specific act he performed as a patrol officer that caused or aggravated his hip osteoarthritis. Instead, Dr. Smit identified several cumulative acts that allegedly caused or aggravated his hip condition. Because Powell was unable to identify a specific “act of duty” he was performing when his injury occurred, this case is not “closely analogous” to *Alm*.

¶ 34 That a police officer must identify one specific “act of duty” to prove a line-of-duty disability is supported by the language of section 3-114.1 of the Code, especially compared to a similar Code provision applicable to firefighters. As set forth above, the line-of-duty disability provision for police officers applies when a police officer is found to be physically or mentally disabled from service “as a result of sickness, accident or injury incurred in or resulting from the performance of an act of duty[.]” 40 ILCS 5/3-114.1 (West 2014). Section 4-110 of the Code provides that a firefighter is entitled to a line-of-duty disability pension if he is found to be physically or mentally disabled from service “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[.]*” (Emphasis added.) 40 ILCS 5/4-110 (West 2014).

¶ 35 Unlike a firefighter, a police officer is not entitled to a line-of-duty disability pension if his disability results from “the cumulative effects of acts of duty.” See 40 ILCS 5/3-110, 114.1 (West 2014). Instead, a police officer is only entitled to a line-of-duty disability pension if his disability results from “the performance of *an* act of duty.” (Emphasis added.) See 40 ILCS 5/3-110 (West 2014). Because Congress included language in section 4-110 of the Code allowing firefighters to establish a line-of-duty disability based on an accident or injury incurred as the result of “the cumulative effects of acts of duty,” but did not include such language in section 3-110, we presume that Congress did not intend for police officers to claim a line-of-duty disability based on more than one act of duty. See *Adames v. Sheahan*, 233 Ill. 2d 276, 311 (2009) (when Congress includes particular language in one section of a statute but omits it in another section, courts presume Congress acted intentionally and purposely).

¶ 36 In this case, Powell failed to present any medical evidence establishing that his hip osteoarthritis was the result of the performance of any specific act of duty. Thus, the Board’s determination that Powell was not entitled to a line-of-duty disability was not against the manifest weight of the evidence. The trial court’s order reversing the Board’s decision is reversed.

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of Kankakee County is reversed; the judgment of Board of Trustees of the Bourbonnais Police Pension Fund affirmed.

¶ 39 Trial court judgment reversed; Board judgment affirmed.