2018 IL App (1st) 171082-U

No. 1-17-1082

Order filed February 20, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ALAN NAGROCKI, Plaintiff-Appellant, v. THE BOARD OF TRUSTEES OF THE NORWOOD PARK FIRE PROTECTION DISTRICT FIREFIGHTERS PENSION FUND and THE NORWOOD PARK FIRE PROTECTION DISTRICT, Intervenor Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 16 CH 12030 Honorable Sophia H. Hall, Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Neville and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Where the record contained evidence that the plaintiff's disability resulted from a degenerative shoulder condition and was not caused by an injury sustained at work, the Board's decision denying the plaintiff a line-of-duty disability pension is affirmed.

¶ 2 Plaintiff Alan Nagrocki appeals the decision of defendant, the Board of Trustees of the Norwood Park Fire Protection District Firefighters Pension Fund (the Board), denying him line-

of-duty disability benefits. Plaintiff instead was awarded non-duty disability benefits based on the Board's determinations that his act of repairing a wall in the firehouse was not an "act of duty" and did not cause his shoulder injury. The circuit court of Cook County affirmed the Board's decision. On appeal, plaintiff contends the Board's determination that his condition was not caused by the incident in question was contrary to the manifest weight of the evidence.

¶ 3 On August 13, 2015, plaintiff filed an application with the Board for a line-of-duty disability pension based on his shoulder injury. Plaintiff later amended his application seeking, in the alternative, a non-duty disability pension. The Norwood Park Fire Protection District (the District) filed a petition to intervene, which the Board granted.

¶ 4 The following evidence was adduced at the administrative hearing before the Board. Plaintiff testified that in September 2014, he was a Norwood Park firefighter assigned to the Red shift, on which he worked one day and had the next two days off. On Thursday, September 18, Commander Stanley Grygiel told plaintiff and his shift co-workers to perform tasks in the firehouse in preparation for a department open house in early October.

¶ 5 On Sunday, September 21, plaintiff began sanding a wall so it could be painted. After working for about 40 minutes, he felt pain in his right shoulder. Plaintiff further testified:

> "I was above my head going side to side and felt just a pop and my hand dropped. I dropped the sanding block. And the only way to describe it was like someone had taken a red hot ice pick and put it through my shoulder and it was deep in the exact middle of my shoulder."

¶ 6 Plaintiff reported his injury to Grygiel and was taken to a hospital emergency room. He testified he had never felt shoulder pain like that and had no prior injuries or degenerative conditions in his shoulder.

¶ 7 Plaintiff filed a workers' compensation claim with the District. Dr. Bruce Summerville completed an independent medical examination (IME) of plaintiff in December 2014 in connection with that claim. Dr. Summerville concluded plaintiff's condition was related to his injury on September 21, 2014, and recommended surgery. Plaintiff underwent arthroscopic shoulder surgery and physical therapy. Plaintiff had a second surgery on May 29, 2015.

¶ 8 Dr. Summerville performed a second IME of plaintiff in August 2015. His report about that examination was issued in September 2015. In his second report, Dr. Summerville stated he had reviewed: (1) his record of his December 2014 examination of plaintiff; (2) notes of plaintiff's appointments with his orthopedist, Dr. Jeffrey Murray; and (3) physical therapy records from appointments that occurred before plaintiff's first surgery to his therapy after his second surgery. Dr. Summerville also reviewed X rays taken in August 2015 and an MRI scan taken on May 1, 2015.

¶ 9 In Dr. Summerville's second report, he made the following conclusions, in relevant part:

> "Reviewing all information now available, in retrospect, Mr. Nagrocki had some early degenerative changes of the glenohumeral joint, which is unusual for a 36-year-old gentleman. This was demonstrated by the finding of an inferior humeral head osteophyte on his preoperative X-rays in September 2014. His MRI did reveal additional pathology, including biceps tendinosis and a partial high-grade rotator cuff tear. In my opinion, these were degenerative in nature and the degenerative condition of his shoulder was

> temporarily aggravated by his work activities. Mr. Nagrocki reports no pre-existing shoulder complaints. However, given the constellation of finding on X-ray and MRI, I believe he had some pre-existing degenerative changes, again which were temporarily aggravated by the work event of September 21, 2014."

¶ 10 Dr. Summerville stated that plaintiff's "failure to respond positively to [his first] surgery indicates that his pain is related to his pre-existing glenohumeral arthritis. He further opined that plaintiff's surgeries "in the short term made him more symptomatic." Dr. Summerville concluded that the September 21, 2014 work injury "did not accelerate the underlying condition beyond the normal progression" and that plaintiff's "current symptoms are not related to that work injury and are the result of his pre-existing glenohumeral arthrosis."

¶ 11 The Board appointed three physicians to conduct IMEs and issue opinions as to the cause of plaintiff's disability. Each doctor reviewed plaintiff's medical records, examined plaintiff in January 2016 and prepared written reports. Those three physicians agreed that plaintiff was disabled.

¶ 12 Dr. William Vitello, the first physician retained by the Board, reported that plaintiff had residual right shoulder chondrolysis (loss of cartilage) with stiffness and his condition was likely permanent. Dr. Vitello noted plaintiff had "no known preexisting condition" in his right shoulder and stated that because plaintiff "gives no history of any prior condition to the right shoulder," his "current condition is related" to the September 21, 2014 incident.

¶ 13 Dr. Michael Peters, the second Board physician, noted that plaintiff's MRI indicated "chronic degenerative and inflammatory changes to his glenohumeral joint, rotator cuff and bicipital tendon." Dr. Peters opined that plaintiff "probably sustained" injury during the "fire

house maintenance work that required repeated overhead extension of his right hand." Dr. Peters concluded: "The other degenerative and inflammatory changes to his rotator cuff and glenohumeral joint pre-existed September 21, 2014 but still could have been work related."

¶ 14 Dr. Sam Biafora, the third Board physician, concluded that plaintiff's "current disability is the result of the September 21, 2014 incident." Dr. Biafora reported that some of plaintiff's symptoms were "related to his underlying glenonumeral joint arthritis that pre-existed the work incident." Because plaintiff had no symptoms and did not seek medical treatment prior to the work injury, Dr. Biafora concluded "the work incident caused an aggravation of this pre-existing condition that had otherwise been asymptomatic."

¶ 15 Following those IMEs, the three Board doctors were supplied with additional medical records, including reports of both IMEs conducted by Dr. Summerville. In March 2016, Dr. Vitello, Dr. Peters and Dr. Biafora issued supplemental reports stating their conclusions were not affected by those additional materials.

¶ 16 The Board denied plaintiff's request for line-of-duty disability benefits, finding he had not met his burden of proof, but granted his application for non-duty disability benefits. The Board found plaintiff was disabled as a result of his right shoulder condition but that condition was "unrelated to and not caused by any act of duty."

¶ 17 In its opinion, the Board found Dr. Summerville's opinion to be most persuasive and further noted "the considerable amount of medical evidence documenting [plaintiff's] preexisting degenerative condition." The Board adopted Dr. Summerville's findings that plaintiff's disability was not related to the September 21, 2014 injury but that it instead resulted from plaintiff's pre-existing glenohumeral arthrosis based on his review of X rays and MRI readings.

¶ 18 The Board further found the IMEs of its three retained doctors supported Dr. Summerville's second report. Although Dr. Vitello found plaintiff's condition was "related" to the work incident, the Board noted Dr. Vitello could not determine whether plaintiff's disability was "caused by that incident or the significant pre-existing conditions." Dr. Peters "noted significant chronic degenerative changes in [plaintiff's] right shoulder that predated the September 21, 2014 injury," though the Board cited Dr. Peters' statement that those pre-existing injuries "could have been work related." The Board observed that Dr. Biafora "identified significant pre-existing degenerative conditions contributing to" plaintiff's disability. The Board noted that even though Dr. Biafora found plaintiff's disability was related to the work incident, the doctor could not determine if it was caused by that incident or by plaintiff's preexisting condition.

¶ 19 The Board further noted the "voluminous medical evidence" of plaintiff's preexisting degenerative condition. The Board pointed out Dr. Summerville's finding that plaintiff's preexisting condition was the cause of plaintiff's disability was based on objective results of the X ray and MRI report. In conclusion, the Board found that plaintiff failed to establish a causal connection between the September 21, 2014 incident and his disability. The Board also found that even had plaintiff proved the incident caused his disability, he did not establish his injury arose from an "act of duty."

¶ 20 Plaintiff filed a complaint for administrative review in the circuit court of Cook County, which affirmed the Board's decision. Plaintiff now appeals.

¶ 21 On appeal, plaintiff contends the Board's decision to deny line-of-duty disability benefits was contrary to the manifest weight of the evidence because all three Board doctors stated that

the work injury either caused or contributed to his disability. He argues that Dr. Summerville's reports contradicted his medical findings

¶ 22 When considering an appeal from a judgment in an administrative proceeding, this court reviews the decision of the administrative agency, not the determination of the circuit court. *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 385 (2010). In an administrative review proceeding, the plaintiff bears the burden of proof. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007).

¶ 23 The findings and conclusions of the administrative agency on questions of fact are held to be *prima facie* true and correct, and we defer to the Board's findings of fact unless they are against the manifest weight of the evidence. *Carrillo v. Park Ridge Firefighters' Pension Fund*, 2014 IL App (1st) 130656, ¶ 21. Whether the evidence before the agency supported the denial of a plaintiff's application for a disability pension under the Code is analyzed using the manifest weight of the evidence standard. *Kouzoukas v. Retirement Board of the Policeman's Annuity & Benefit Fund*, 234 Ill. 2d 446, 463 (2009); *Wade*, 226 Ill. 2d at 505 (whether the evidence of record supports the Board's denial of plaintiff's application is a question of fact). See also *Carrillo*, 2014 IL App (1st) 130656, ¶ 22 (whether a work-related incident caused a plaintiff's disability is a "purely factual determination" reviewed under the manifest weight of the evidence standard).

¶ 24 When applying the manifest weight of the evidence standard, the agency's decision should be affirmed if the record contains evidence to support it. *Id.* ¶ 24 (citing *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992)). A judgment is contrary to the manifest weight of the evidence only when the findings appear to be

unreasonable, arbitrary, or not based on evidence, or when an opposite conclusion is apparent. *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶ 23. "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." *Abrahamson*, 153 Ill. 2d at 88.

¶ 25 Plaintiff asserts that because Dr. Summerville did not testify, we can consider his reports without deference to the Board's findings because a reviewing court is able to review documentary evidence *de novo*, citing *Wilfert v. Retirement Board of Firemen's Annuity & Benefit Fund*, 318 Ill. App. 3d 507, 514 (2000). We note that none of the physicians testified before the Board; the four doctors' findings and conclusions were presented via medical reports. We therefore review their reports *de novo*; however, our overall consideration remains whether the Board's decision was contrary to the manifest weight of the evidence. See *Ambrose v. Thornton Township School Trustees*, 274 Ill. App. 3d 676, 680-81 (1995) (this court evaluated two school district boundary maps *de novo* and found the administrative agency's decision was contrary to the manifest weight of the evidence).

¶ 26 Line-of-duty disability pensions are governed by section 4-110 of the Illinois Pension Code (the Code) (40 ILCS 5/4-110 (West 2012)), which states in relevant part:

> "If a firefighter, as the result of a 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 *** the firefighter shall be entitled to a disability pension equal to the greater of (1) 65% of the monthly salary attached to the rank held by him or her in the fire department at the date he or she is removed from the municipality's fire department payroll or (2) the

retirement pension that the firefighter would be eligible to receive if he or she retired (but not including any automatic annual increase in that retirement pension)."

¶ 27 A firefighter is entitled to a "not in duty" disability pension of 50% of his monthly salary if he is "disabled as a result of any cause other than an act of duty" and found "to be physically or mentally permanently disabled so as to render necessary his or her being placed on disability pension." 40 ILCS 5/4-111 (West 2012).

¶ 28 The claimant has the burden of proof to establish a causal connection between an act of duty and his disability. *Wade*, 226 Ill. 2d at 505. However, for a claimant to be awarded line-of-duty disability benefits, the claimant "need not prove that a duty-related accident is the sole cause, or even the primary cause, of his disability." *Luchesi v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 333 Ill. App. 3d 543, 550 (2002). There is "no requirement that the duty-related incident be the originating or primary cause of injury, although a sufficient nexus between the injury and the performance of the duty must exist." *Wade*, 226 Ill. 2d at 505 (quoting *Barber v. Board of Trustees of the Village of South Barrington Police Pension Fund*, 256 Ill. App. 3d 814, 818 (1993)). Rather, the claimant 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*, 2016 IL App (1st) 131066, ¶ 23. A disability finding can be based on "the line-of-duty aggravation of a preexisting physical condition." *Wade*, 226 Ill. 2d at 505.

¶ 29 In arguing the Board's finding on causation was contrary to the manifest weight of the evidence, plaintiff contends that Dr. Summerville's second report contradicted his initial findings. Plaintiff argues Dr. Summerville's two reports cannot be reconciled with the opinions

of the three Board doctors. Plaintiff points out he did not need surgery to correct his condition until after the September 2014 incident.

¶ 30 A *de novo* review of those reports reveals sufficient evidence to support the Board's ruling. Although plaintiff asserts the three Board physicians agreed that the incident aggravated his pre-existing condition, we note that those three doctors reached varying conclusions. Dr. Vitello determined plaintiff's condition was "related" to the incident in question, Dr. Peters opined that plaintiff's injury "could have been work related" and Dr. Biafora concluded the incident aggravated plaintiff's pre-existing condition. Moreover, each doctor provided supplemental statements that his conclusions were not affected by Dr. Summerville's first and second reports.

¶ 31 Plaintiff asserts Dr. Summerville lacked all available medical information in completing his second report. Plaintiff argues that report, which was issued in September 2015, was "based on incomplete diagnostic testing" because the doctor did not examine the results of his EMG examination. He further argues Dr. Summerville did not consider a nerve conduction study done in December 2015 that was reviewed by the three Board doctors and did not consider evidence that he had a brachial plexus injury.

¶ 32 In response, the Board asserts that as to the nerve conduction study, the three Board doctors noted the study was among the materials reviewed but the findings of that test were "not adopted, incorporated, or otherwise discussed" in their reports. We lack any basis to conclude Dr. Summerville's review of that study would have affected his opinion. In addition, plaintiff also does not explain how the additional testing he cites would have changed Dr. Summerville's assessment.

¶ 33 Plaintiff relies on *Scepurek* to assert that an agency's decision can be contrary to the manifest weight of the evidence where it relies "heavily on one medical expert's testimony to the exclusion of other medical opinions and medical documentation." *Scepurek*, 2016 IL App (1st) 131066, ¶ 28 (citing *Wade*, 226 Ill. 2d 485). Plaintiff also cites *Wade* and *Hopkins v. Board of Trustees of Firefighters' Pension Fund*, 2016 IL App (5th) 160006, ¶ 50, which found the agency's determinations violated that standard.

¶ 34 In *Scepurek*, this court found the agency's decision against the manifest weight of the evidence where all of the doctors who examined the plaintiff concluded the incident in question contributed "at least in part" to the plaintiff's disability. *Scepurek*, 2016 IL App (1st) 131066, ¶ 29. As set out in detail above, the physicians in this case did not render unanimous opinions.

¶ 35 In *Wade*, the administrative agency relied on the opinion of one physician, Dr. Milgram, that the claimant was not disabled, despite the contrary determinations of four other doctors, two of whom stated the injury at issue aggravated a preexisting condition. *Wade*, 226 Ill. 2d at 505-06. In reversing that judgment, the supreme court found the latter examinations were more complete than that performed by Dr. Milgram and those doctors' "analyses [] were more complete and better substantiated." *Id*. The supreme court noted Dr. Milgram's review of the plaintiff's records was "cursory" and did not provide a factual basis to conclude the plaintiff's present state was caused by a preexisting condition as opposed to a recent injury. *Id*. at 506-07.

¶ 36 In *Hopkins*, this court followed *Wade* in reversing an agency's decision that was based on the testimony of one doctor, Dr. Katz, "to the exclusion of other medical opinions." *Hopkins*, 2016 IL App (5th) 160006, ¶ 50. The plaintiff in *Hopkins* applied for line-of-duty disability benefits based on the cumulative effect of injuries in two incidents that occurred two years apart.

Id. ¶ 3. In finding the agency's decision was against the manifest weight of the evidence, this court stated that Dr. Katz's conclusions were not based on all of the relevant data, and the court noted Dr. Katz did not examine the plaintiff after his second incident. *Id*. ¶ 48. Moreover, Dr. Katz's opinion that the plaintiff was disabled before his first accident was inconsistent with the fact that the plaintiff returned to work after both incidents. *Id*.

¶ 37 We find the evidence before the Board in this case is distinguishable from that presented in *Scepurek, Wade* and *Hopkins*. Here, differing opinions were offered. Dr. Summerville's second report was based on additional information not provided when he first examined plaintiff. Even though Dr. Vitello concluded that plaintiff's condition was "related" to the incident in question, Dr. Peters and Dr. Biafora found that plaintiff had a degenerative condition in his shoulder. Because the record contains evidence to support the Board's determination that plaintiff's disability was not caused by the September 21, 2014 incident, the Board's decision must be affirmed.

¶ 38 In conclusion, the Board's determination that the incident did not cause plaintiff's disability is not contrary to the manifest weight of the evidence. Given that lack of causation, it is not necessary to address plaintiff's contention that he was performing an "act of duty" when his injury occurred. Accordingly, the order of the circuit court upholding the Board's decision to deny plaintiff a line-of-duty disability benefit and award a non-duty benefit is affirmed.

¶ 39 Affirmed.