THIRD DIVISION
August 17, 2011

2011 IL App (1st) 102458-U
No. 1-10-2458

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GEORGE LATSOS, Plaintiff-Appellant, v. THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, Defendant-Appellee.	Appeal from the Circuit Court of Cook County, Illinois. No. 09 CH 17769 Honorable Sophia H. Hall, Judge Presiding.

Murphy, J., delivered the judgment of the court.
Neville and Steele, JJ., concurred in the judgment.

O R D E R

HELD: The determination that plaintiff's disability resulted from a preexisting condition, as opposed to an on-duty injury, was not against the manifest weight of the evidence or based on an improper statutory construction. Further, the circuit court did not abuse its discretion in declining to remand for consideration of newly discovered evidence.

¶ 1 Defendant, the Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago (Board), granted plaintiff, George Latsos, duty disability benefits in the amount of 50% -- as opposed to 75% -- of his base salary after finding that his disability resulted from a physical defect or mental disorder or disease which existed at the time his on-duty injury was sustained. The circuit court affirmed the Board's decision. On appeal, plaintiff contends that the

Board's decision is based upon an improper construction of the Illinois Pension Code and is not supported by the medical evidence. He further contends that the matter should have been remanded to the Board for consideration of newly-discovered evidence. For the reasons that follow, we affirm.

¶ 2 Plaintiff was appointed a Chicago police officer in 1998. In December 2008, he applied for duty disability benefits under section 5-154 of the Illinois Pension Code, which allows for a benefit equal to 75% of salary if the officer becomes disabled "as the result of injury incurred *** in the performance of an act of duty," or a 50% benefit "[i]f the disability resulted from any physical defect or mental disorder or any disease which existed at the time the injury was sustained." 40 ILCS 5/5-154(a), (a)(I) (West 2008). In his application, plaintiff stated that his neck had been injured in an on-duty car accident in August 1999. Then, in August 2006, he was involved in another on-duty car accident. According to plaintiff, "The neck injuries suffered in the 1999 injury on duty were aggravated and exacerbated by the 2006 injury on duty." Plaintiff thereafter underwent spinal surgery. He asserted in the application that as a result of his neck injuries, he was unable to work as a police officer.

¶ 3 A hearing on plaintiff's application for disability benefits was held in March 2009. At the outset of the hearing, the parties agreed to enter into the record plaintiff's medical file, which had been provided by the Chicago Police Department, and other documents submitted by plaintiff.

¶ 4 The documents before the Board indicated that on August 4, 1999, plaintiff was involved in a car accident while on duty. An x-ray taken at the emergency room revealed a "normal cervical spine." However, plaintiff complained of neck and upper back pain shortly thereafter at a follow-up appointment with Dr. James Niemeyer, who diagnosed plaintiff with "cervical thoracic strain sprain" and noted "one underlying area of somatic dysfunction C5-6 on the right." Plaintiff returned to work 13 days after the accident.

¶ 5 Seven years later, on August 5, 2006, plaintiff was involved in another car accident while on duty. He received emergency treatment and followed up with Dr. Mark Nolden 12 days later.

At that time, his chief complaint was posterior neck pain with associated numbness and paresthesias in the bilateral thumb, index, and middle fingers. Dr. Nolden noted that plaintiff had been experiencing this pain for approximately six to eight months. He reviewed an MRI of plaintiff's cervical spine from May 8, 2006, which revealed a degenerative disc at C6-7 and moderate left neuroforaminal stenosis. He also reviewed x-rays that were obtained on the day of the appointment and reported that they revealed disc space collapse at C6-7. Dr. Nolden diagnosed plaintiff with cervical strain, cervical spondylosis, and a "likely C7 spondylitic radiculopathy." He prescribed physical therapy.

¶ 6 After completing four weeks of physical therapy, plaintiff returned to Dr. Nolden, complaining of continuing neck pain and worsening of the tingling and numbness in his left thumb, index, and middle fingers. Dr. Nolden ordered an EMG/NCV of the upper extremities and a cervical epidural steroid injection targeted especially to the left at the C6-7 level. The EMG/NCV test demonstrated evidence of a left C7 radiculopathy and a left sensorimotor median mononeuropathy at the wrist.

¶ 7 Plaintiff returned to work in a full-duty capacity in November 2006. In April 2007, plaintiff underwent two MRIs of his cervical spine.

¶ 8 In June 2007, plaintiff was evaluated by Dr. David Spencer. At the time, plaintiff's primary complaint was elbow pain, left worse than right. Dr. Spencer diagnosed the problem as lateral epicondylitis, or tennis elbow. He opined that plaintiff was physically incapable of working, as he was left-handed and "trying to hold and fire a weapon with lateral epicondylitis on the left is extremely painful and difficult to do." Dr. Spencer reported to the Chicago Police Department that based on a review of plaintiff's medical records, it appeared plaintiff's neck complaints were related to the on-duty injury, but he could not associate the lateral epicondylitis with the on-duty injury.

¶ 9 Dr. Nolden thereafter wrote to the Chicago Police Department, responding to its inquiry whether plaintiff's bilateral elbow lateral epicondylitis was related to his cervical injury. Dr.

Nolden reported that he was unaware of the diagnosis of tennis elbow, but that nonetheless, it had no relation to his cervical pathology.

¶ 10 In August 2007, plaintiff saw Dr. David Kalainov for a second opinion. Dr. Kalainov diagnosed plaintiff with lateral epicondylitis in both elbows, left more symptomatic than right.

¶ 11 In September 2007, plaintiff was examined by Dr. Wesley Yapor. Dr. Yapor reviewed one of plaintiff's MRIs and agreed with the diagnosis of C6-7 disc disease. He stated that plaintiff's complaints of intrascapular discomfort and pain over the forearm region and left upper extremity were related to the disc disease. Dr. Yapor recommended a C6-7 disc replacement.

¶ 12 Dr. Yapor performed disc replacement surgery in October 2007. He reported that at post-surgery follow-up appointments, plaintiff had no complaints "from the cervical standpoint." Plaintiff still reported pain in his left elbow, but Dr. Yapor opined that this pain was related to tennis elbow, not radicular symptomatology. Dr. Yapor recommended physical therapy for conditioning prior to returning to active police duty. He also ordered an MRI, which was performed in November 2007. The MRI revealed bilateral uncinate degenerative changes and mild to moderate left neural foraminal stenosis at C6-7. Dr. Yapor determined that plaintiff was able to return to work at the end of February 2008. Plaintiff returned to duty on February 29, 2008.

¶ 13 In November 2008, plaintiff was examined by Dr. Christopher Plastaras. Dr. Plastaras reported that plaintiff complained of left neck pain which began after he was involved in a motor vehicle collision in August 2006. Dr. Plastaras further reported that plaintiff was in his "usual state of excellent health until the patient was involved in an automobile versus automobile collision" in August 2006. Dr. Plastaras gave a diagnosis of mild to moderate left neural foraminal stenosis.

¶ 14 In December 2008, plaintiff went to Dr. Steven Stanos, complaining of chronic neck pain and numbness in his left hand and fingers. Dr. Stanos recommended an interdisciplinary

treatment plan, including physical therapy, occupational therapy, psychology, relaxation training, and medical management.

¶ 15 Plaintiff exhausted his injury-on-duty medical leave on December 8, 2008. He applied for disability benefits.

¶ 16 In January 2009, the Board sent plaintiff to Dr. Kern Singh for a third-party independent medical evaluation. At the time, plaintiff reported neck pain and left upper extremity dysestheslas. Dr. Singh reviewed plaintiff's medical history, performed an examination, and gave a diagnosis of cervical muscular strain. He wrote in his report, "I do not believe the patient's current symptoms are causally related to his work-related injury." Dr. Singh opined that plaintiff could return to work, full duty without restrictions.

¶ 17 In February 2009, plaintiff returned to Dr. Yapor for follow-up treatment. Plaintiff reported muscle spasms and occasional tingling in his left hand and fingers. Dr. Yapor ordered an x-ray of the cervical spine, a CT scan, and an EMG.

¶ 18 In early March 2009, Dr. Eric Mizuno, plaintiff's internist, wrote a letter to the Board. He summarized plaintiff's medical history, stating that his neck injuries began in 1999 following an on-duty car accident which resulted in a cervical strain injury. Dr. Mizuno wrote that he saw plaintiff for this injury in February 2006, and that a May 2006 MRI showed "multilevel cervical spondylosis worst at C6-C7 with left neuroforaminal stenosis." Following the August 2006 car accident, plaintiff underwent cervical spine surgery. Dr. Mizuno reported that plaintiff continued to experience neuroforaminal stenosis at C6-7 despite surgery, and that he also developed severe left elbow pain. Dr. Mizuno reported plaintiff had numbness/paresthesias of the left hand, which did not allow him to use a gun optimally, and had ongoing neck pain, which required daily narcotic medication, a concern when considering his ability to work safely. Dr. Mizuno stated that in his medical opinion, plaintiff was not capable of working.

¶ 19 In addition to being presented with the above medical reports, the Board heard testimony from plaintiff.

¶ 20 Plaintiff testified that his disability claim was based on the car accidents he was involved in on August 4, 1999, and August 5, 2006. Following the first accident, he was given emergency treatment that involved the taking of x-rays, and then he returned to work 13 days after the accident. Despite returning to work, plaintiff testified that "the '99 incident is -- I think that threw me over the edge, but I think the '99 incident is what started this all." When asked about the apparent lack of medical treatment between 1999 and 2006, plaintiff explained that he was "basically putting up with it" and seeing his internist, Dr. Mizuno. Plaintiff testified that his elbow pain began after the 2006 car accident, and that he "really started feeling it" after the EMG of October 2006.

¶ 21 Plaintiff testified that his neck pain was constant and that his pain world get worse in damp or cold weather. He stated that he could not ride a motorcycle due to the numbness in his left hand and the painful vibrations. He explained that his pain was in his back, down his shoulder blade, and into his elbow, and that his hand would go numb. Plaintiff related that in November 2008, his left hand went numb while he was responding to a home invasion call. He did not believe he could return to work because he could not fire a gun.

¶ 22 Plaintiff stated that he was currently under the care of Dr. Yapor and Dr. Mizuno, and that neither of those doctors had released him to work. He also stated that Dr. Yapor had ordered a functional capacity examination, the results of which were pending.

¶ 23 Following plaintiff's testimony, the Board recessed into executive session. When the Board members returned to open session, they voted unanimously to award plaintiff duty disability. A motion to award benefits at 75% of salary was voted down 3 to 4, but a motion to award benefits at 50% of salary passed.

¶ 24 In its written decision, the Board detailed its findings of fact. The Board found that plaintiff was disabled by his left hand and elbow complaints, which prevent him from safely discharging his weapon, but that the 1999 car accident was not disabling, as he was able to return to full duty without reported medical attention for his neck injury until early 2006. The Board

found that in May 2006, plaintiff had an MRI which revealed "cervical spondylosis, C6-C7 (degenerative osteoarthritis)." In August 2006, plaintiff was involved in another car accident and complained to various physicians about neck pain and tingling in his left hand. However, the Board found that Dr. Nolden and other physicians had made reference to these complaints 6 to 8 months prior to the August 2006 car accident.

¶ 25 The Board found that the injury plaintiff suffered in the 1999 car accident was not aggravated or exacerbated by the 2006 car accident. Instead, the Board determined that plaintiff "had a degenerative cervical spine condition not duty related (as noted in May 2006 MRI) and that pre-existing condition was aggravated or exacerbated by the August 2006 incident." Accordingly, the Board granted plaintiff a 50% duty disability benefit.

¶ 26 On appeal from the circuit court's affirmance of the Board's decision, plaintiff contends that the Board's decision is based upon an improper construction of section 5-156 of the Illinois Pension Code, which provides, in relevant part, as follows:

> "Proof of duty, occupational disease, or ordinary disability shall be furnished to the board by at least one licensed and practicing physician appointed by the board. In cases where the board requests an applicant to get a second opinion, the applicant must select a physician from a list of qualified licensed and practicing physicians who specialize in the various medical areas related to duty injuries and illnesses, as established by the board." 40 ILCS 5/5-156 (West 2008).

Plaintiff argues that this section "is a legislative acknowledgment that the Board members are not doctors and will therefore require the assistance of qualified medical professionals to aid them in their decisions." According to plaintiff's argument, the Board members misconstrued section 5-156 so as to allow them to interpret medical records and reach their own conclusions regarding

causation and the relevance of a preexisting condition. Plaintiff asserts that the Board's conclusion that his disability resulted from a preexisting condition -- qualifying him for only a 50% benefit under section 5-154 -- is entirely unsupported by expert testimony and, therefore, must be reversed. He seeks to have the matter remanded to the Board with instructions to award him benefits at 75% of salary.

¶ 27 In the instant case, there is no dispute that plaintiff is disabled, that he suffered from preexisting degenerative disc disease at C6-7, or that he sustained injuries while performing acts of duty in the car accidents of 1999 and 2006. Here, the dispute revolves around the issue of causation, as disabled officers are entitled to different levels of benefits depending on how their disabilities arise. Section 5-154 of the Illinois Pension Code allows for a duty disability benefit equal to 75% of salary if the officer becomes disabled "as the result of injury incurred *** in the performance of an act of duty," but only a 50% benefit if the disability "resulted from any physical defect or mental disorder or any disease which existed at the time the injury was sustained." 40 ILCS 5/5-154(a), (a)(I) (West 2008).

¶ 28 This court has interpreted section 5-154 as providing benefits in two circumstances: "(1) where a disability occurs *as a result of* (is caused by) an on-duty injury; and (2) where a disability *results from* (stems from) a *preexisting condition* as opposed to being *caused by the injury*." (Emphasis in original.) *Samuels v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 289 Ill. App. 3d 651, 661 (1997); see also *Cole*, 396 Ill. App. 3d at 369. Thus, if a disability results from a preexisting condition that existed at the time an act-of-duty injury was sustained, the officer is entitled to a duty disability benefit at 50% of salary. *Cole*, 396 Ill. App. 3d at 369. Put another way, an officer will be given a 50% benefit if the disability resulted from the preexisting condition, notwithstanding the effect that an act-of-duty injury may have had on that condition. *Samuels*, 289 Ill. App. 3d at 662.

¶ 29 Here, the Board determined that plaintiff was disabled due to a preexisting degenerative cervical spine condition which was not duty related, but was aggravated or exacerbated by the

August 2006 car accident. Plaintiff takes issue with this determination, arguing that the Board members did not base it on expert medical opinion, as required by section 5-156, but instead, on their own interpretation of medical records. He maintains that no physician gave the opinion that his disability resulted from a preexisting condition, and asserts that because the Board's conclusion is "entirely unsupported by expert testimony," it must be reversed.

¶ 30 Whether the evidence supports the Board's denial of disability benefits is a question of fact to which we apply the manifest weight standard of review. *Wade v. North Chicago Police Pension Board*, 226 Ill. 2d 485, 505 (2007); *Cole v. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 396 Ill. App. 3d 357, 367 (2009). The decision of an administrative agency will be found to be against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Wade*, 226 Ill. 2d at 504. We may not reverse merely because an opposite conclusion is reasonable or because we may have ruled differently, and we may not reweigh the evidence or substitute our judgment for the agency's. *Cole*, 396 Ill. App. 3d at 368. Where there is evidence in the record that supports the agency's decision, we will affirm. *Cole*, 396 Ill. App. 3d at 368. Under any standard of review, the plaintiff bears the burden of proof, and failure to meet that burden will result in denial of the relief sought. *Wade*, 226 Ill. 2d at 505.

¶ 31 After reviewing the record, we cannot say that the Board's finding was contrary to the manifest weight of the evidence. None of the medical evidence presented included a positive statement that plaintiff's disability was a result of an on-duty injury. Plaintiff argues that such evidence was presented in a July 2007 letter from Dr. Spencer to the Chicago Police Department, in which Dr. Spencer stated that plaintiff's neck complaints were related to an on-duty injury. Plaintiff asserts that it is with this evidence that he satisfies his burden of proof that his disability was not the result of a non-duty preexisting neck condition. He argues, "This is direct evidence of causation provided by an expert."

¶ 32 We disagree. When read in its entirety, Dr. Spencer's letter undermines plaintiff's position. Dr. Spencer begins the letter by stating he recently evaluated plaintiff and concluded that his "real problem" was lateral epicondylitis, also known as tennis elbow, worse on the left than the right. Dr. Spencer stated that no further diagnostic studies or treatment were necessary with respect to plaintiff's cervical spine. He wrote, "Based on a review of his medical records, it appears that his neck complaints were related to the IOD, but I cannot associate his lateral epicondylitis with the IOD." Thus, it was Dr. Spencer's opinion that plaintiff's main medical problem was tennis elbow, as opposed to neck complaints, and that the tennis elbow was not related to the on-duty injury. While Dr. Spencer's letter would support a conclusion that plaintiff was disabled due to tennis elbow, it does not support a conclusion that plaintiff was disabled due to injury sustained while on duty.

¶ 33 Plaintiff also takes issue with the Board's finding that a May 2006 MRI which revealed "cervical spondylosis, C6-C7 (degenerative osteoarthritis)." Plaintiff argues, "It is impossible to know which member of the Board provided the diagnosis of degenerative osteoarthritis; but the record is clear no doctor provided it." Again, we cannot take plaintiff's view. In a letter written in March 2009, plaintiff's internist, Dr. Mizuno, wrote that a May 2006 MRI showed "multilevel cervical spondylosis worst at C6-C7 with left neuroforaminal stenosis." The Board's finding that plaintiff suffered from cervical spondylosis is based on Dr. Mizuno's letter. The Board's use of "degenerative osteoarthritis" in parentheses is nothing more than its offer of an alternative name for the same medical condition. We cannot agree that the Board was providing its own independent diagnosis.

¶ 34 It was plaintiff's burden to show that his disability resulted from an on-duty injury, as opposed to a preexisting medical condition. See *Wade*, 226 Ill. 2d at 505 (a plaintiff in an administrative proceeding bears the burden of proof). Plaintiff did not meet this burden. None of the medical records presented to the Board included a statement by a doctor that an on-duty injury caused plaintiff to be disabled.

¶ 35 In contrast, evidence was presented supporting the Board's determination that plaintiff's disability resulted from his preexisting degenerative cervical spine condition. As noted above, Dr. Mizuno reported that a May 2006 MRI showed multilevel cervical spondylosis at C6-7. Dr. Nolden, who treated plaintiff after the August 2006 car accident, noted that plaintiff had been experiencing neck pain for six to eight months prior to the accident. He reviewed the MRI from May 2006, determined it revealed a degenerative disc at C6-7, and diagnosed plaintiff with cervical spondylosis, among other conditions. In September 2007, Dr. Yapor, the doctor who eventually performed plaintiff's surgery, reported that he agreed with the diagnosis of C6-7 disc disease, and stated that plaintiff's complaints of pain were related to the disc disease. In 2009, Dr. Mizuno opined that plaintiff was not capable of working due to numbness in his left hand and daily narcotic medication for pain relief.

¶ 36 Given that the record contains evidence supporting the Board's determination, we reject plaintiff's argument that the Board members misconstrued section 5-156 of the Pension Code so as to allow them to interpret medical records and reach their own conclusions regarding causation. Having reviewed the record, we cannot find that a conclusion opposite to the Board's was clearly evident. Because the record contains evidence to support the Board's decision, we must affirm. See *Cole*, 396 Ill. App. 3d at 368.

¶ 37 Plaintiff's second contention on appeal is that the circuit court and this court should have granted his motions to remand to the Board for consideration of newly-discovered evidence. This evidence was a report written by Dr. Jay Levin, dated November 3, 2009, which included Dr. Levin's opinion that the August 2006 car accident "resulted in the need for" plaintiff's spinal surgery. Dr. Levin had examined plaintiff as part of an annual review to determine whether plaintiff continued to be disabled or whether he could return to active service.

¶ 38 Section 3-111(a)(7) of the Code of Civil Procedure provides that a trial court reviewing an administrative decision has the power to:

> "remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it shall appear that such action is just. However, no remandment shall be made on the ground of newly discovered evidence unless it appears to the satisfaction of the court that such evidence has in fact been discovered subsequent to the termination of the proceedings before the administrative agency and that it could not by the exercise of reasonable diligence have been obtained at such proceedings; and that such evidence is material to the issues and is not cumulative." 735 ILCS 5/3-111(a)(7) (West 2008).

Whether to remand a case to an administrative agency to present new evidence is a matter within the sound discretion of the trial court. *Morelli v. Ward*, 315 Ill. App. 3d 492, 499 (2000).

¶ 39 The Board argues that Dr. Levin's opinion does not constitute evidence, since it arose from an examination performed in a separate proceeding with a different focus. We agree with the Board Dr. Levin's opinion is not material to the instant matter. The opinion highlighted by plaintiff -- that the August 2006 car accident resulted in the need for plaintiff's spinal surgery -- does not speak to the issue in the instant case, that is, the cause of plaintiff's disability. Given the lack of probative value to the issues in the instant case, the trial court did not abuse its discretion in refusing to remand for consideration of Dr. Levin's report.

¶ 40 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.