FIRST DIVISION
FILED: April 16, 2012

No. 1-11-1933

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN W. CHWARZYNSKI, Plaintiff-Appellant, v. THE RETIREMENT BOARD OF THE FIREMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO, Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. No. 09 CH 39466 HONORABLE KATHLEEN M. PANTLE, JUDGE PRESIDING.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The decision of the Board is vacated, and the cause is remanded for further proceedings, during which the plaintiff must be permitted to select the doctor who will render a second opinion and to present evidence based on the examination performed by that doctor.

¶ 2 The plaintiff, John W. Chwarzynski, appeals from a judgment of the circuit court confirming the decision of the Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago (Board),

denying his petition for occupational disease disability benefits pursuant to section 6-151.1 of the Illinois Pension Code (Code) (40 ILCS 5/6-151.1 (West 2008)). For the reasons that follow, we reverse the circuit court's judgment confirming the denial of benefits, vacate the Board's decision, and remand the matter to the Board for further proceedings.

¶ 3 The following factual recitation is taken from the evidence presented at the Board hearing conducted on seven dates over the course of nine months.

¶ 4 The 45-year-old plaintiff was appointed a member of the Chicago fire department (Department) in February 1987 and achieved the rank of lieutenant in August 2001. He served as the president of the Chicago Fire Fighters' Union Local #2 from May 2005 to July 2007 and did not participate in fire suppression activities duties during that two-year time period. Based on the advice of his treating physician, who indicated that he was not capable of working as a firefighter, the plaintiff was placed on the medical rolls on November 13, 2007. The plaintiff subsequently was informed that he would be placed on unpaid medical leave on November 12, 2008, as a result of his condition and the exhaustion of his one-year paid medical leave period. In October 2008, the plaintiff filed an application for occupational disease disability benefits pursuant to section 6-151.1 of the Code (40 ILCS 5/6-151.1 (West 2008)).

¶ 5 In a letter dated November 7, 2008, Dr. Isaac C. Morcos, an occupational health physician for the Department, stated that the plaintiff was placed on the medical rolls on November 13, 2007, "due to chest pain and dyspnea which he experienced while off-duty." Dr. Morcos' letter also stated that the plaintiff's medical records indicated that he had undergone "an extensive cardiopulmonary work-up for his condition", which included the following: normal cardiac stress test and gated

ejection fraction study (EF 60%) with exercise-induced bouts of coughing, normal chest x-ray and CT examination of the chest, normal M-mode, 2D-cardiac Doppler study, pan sinusitis with involvement of the osteomeatal complexes on CT of sinuses, and partially reversible airways obstruction on pulmonary function test with FEV1/FVC of 46%. Dr. Morcos also stated that the plaintiff had been receiving extensive medical treatment for his condition and that, despite such treatment, he continued to complain of persistent cough.

¶ 6 Dr. George S. Motto, a physician for the Firemen's Annuity and Benefit Fund (Fund) examined the plaintiff and prepared a written report dated November 18, 2008. In that report, Dr. Motto stated that the plaintiff had "a history of significant coughing episodes dating back at least several years," but that he had not been removed from a fire scene because of this problem. Dr. Motto summarized the medications prescribed to the plaintiff and the various tests performed by Dr. Giacchino, the plaintiff's primary care physician, and by Dr. Rosenberg, a pulmonary specialist. Dr. Motto noted that, during the examination, the plaintiff "began coughing fairly significantly" and "had paroxysms of coughing." Dr. Motto further stated that the plaintiff's "lungs were remarkably clear[,] although he does have a history of wheezing." In the "Comment" portion of his report, Dr. Motto stated that "[p]ulmonary function tests suggest obstructive disease."

¶ 7 The plaintiff's application was scheduled for hearing on December 17, 2008. On that date, the Board voted to defer the hearing until it received an independent medical examination (IME) with respect to the plaintiff's condition. Following this vote, counsel for the Board informed the plaintiff and his attorney that a list of the Board's approved IME physicians would be provided and that he would advise them of the name of the IME physician who would perform the examination.

The plaintiff's attorney responded by stating that the plaintiff sought to assert his right to choose the doctor who would perform the exam, pursuant to section 6-153 of the Code.

¶ 8 On January 7, 2009, the Board notified the plaintiff that an appointment had been arranged for an IME to be performed by Dr. Terrence C. Moisan, a pulmonary specialist. Thereafter, the plaintiff and the Board exchanged written correspondence regarding his right to select the doctor who would perform the IME. On February 19, 2009, the Board denied the plaintiff's motion for appointment of one of three independent medical examiners chosen by him from the Board's list of approved pulmonary specialists. Dr. Moisan examined the plaintiff on March 11, 2009, and he also interpreted a pulmonary function test. Thereafter, counsel for the plaintiff objected to the use of Dr. Moisan's report on the basis that he had been denied his statutory right to choose the second-opinion doctor from the list of Board-appointed physicians.

¶ 9 At the hearing, the plaintiff testified that he had worked in the most "fire-active" areas of Chicago for 20 years. During that time he responded to hundreds of fires and other "hazmat" or emergency situations. According to the plaintiff, he had inhaled large amounts of smoke and other toxic gases and had been treated with oxygen at the scene numerous times and, on one occasion, was on oxygen when he was taken by ambulance to the hospital for treatment. The plaintiff testified that he recalled at least three severe smoke and/or toxic gas inhalations during his firefighting career.

¶ 10 The plaintiff's medical records reflect that he began treating with Dr. Joseph L. Giacchino, his family physician, in 2002 for a recurrent upper respiratory infection and bronchitis. His cough progressed from occasional to chronic in 2002 and worsened between 2002 and 2007. Dr. Giacchino treated the plaintiff with antibiotics and inhalers until November 2007, when he referred the plaintiff

to Dr. Neil Rosenberg, a pulmonary specialist. In a subsequent report, dated September 9, 2008, Dr. Giacchino stated that tests performed in his office showed that the plaintiff had a significant degree of chronic obstructive pulmonary disease (COPD) and chronic bronchitis. Dr. Giacchino recommended that the plaintiff avoid any further exposure to smoke, fumes, and dust because his chronic condition could be easily and acutely exacerbated. In addition, Dr. Giacchino stated that significant exposure to these conditions would place the plaintiff in a "life-threatening" situation. Dr. Giacchino expressed his opinion that the plaintiff is totally disabled from employment as a firefighter.

¶ 11 The plaintiff treated with Dr. Rosenberg for approximately one year from November 2007 until September 2008. When he was first seen by Dr. Rosenberg, the plaintiff did not report any history of duty-related smoke inhalation, and he denied any history of wheezing or of asthma. The plaintiff underwent a CT exam and chest x-ray on November 12, 2007, both of which were normal and showed his lungs to be clear. Dr. Rosenberg also noted that the plaintiff's oxygen saturation was 98%. The plaintiff appeared for a pulmonary function test on December 18, 2007, but the test could not be completed due to interference as a result of the plaintiff's coughing. The technician who administered that test concluded that the spirometric results were unacceptable due to the coughing. The test report did not include any interpretation by a physician. A subsequent pulmonary function test, performed on January 20, 2008, indicated that the plaintiff had a moderate obstruction, but that test did not yield any acceptable and reproducible spirometric results.

¶ 12 Dr. Rosenberg reported that he aggressively treated the plaintiff's cough with antibiotics, bronchodilators, steroid medications, and diagnostic tests. According to Dr. Rosenberg, the

symptoms experienced by the plaintiff usually respond to these treatments. In February 2008, Dr. Rosenberg indicated that the plaintiff's cough was slowly improving and that he should be able to return to work within four to six weeks. The plaintiff reported to Dr. Rosenberg that he had experienced an episode of cough syncope on February 19, 2008, and was seen at Resurrection Hospital. Dr. Rosenberg gave an impression of COPD with hyperactive airways. A subsequent CT scan of the plaintiff's sinuses indicated that he had pansinusitis with involvement of the ostiomeathal complexes.

¶ 13 In May 2008, the plaintiff was evaluated by Dr. James Stankiewicz, who performed a nasal sinus endoscopy, which indicated that the plaintiff suffered from chronic sinusitis, which was refractory to medical treatment, and allergic rhinitis. Dr. Stankiewicz noted that the plaintiff's "sinusitis may be contributing to [his] lung issues." The plaintiff underwent another pulmonary function test, performed by Dr. Nelson Kanter on August 14, 2008. In his report, Dr. Kanter stated that the test performance was impaired by the plaintiff's persistent cough, and the lung-diffusing capacity test could not be done because the plaintiff could not perform a breath-holding maneuver necessary for the test. Dr. Kanter concluded that the test was "partially successful," due to persistent cough, and that the spirometry results suggested a pattern of partially reversible airways obstruction.

¶ 14 In a report dated September 11, 2008, Dr. Rosenberg summarized his treatment of the plaintiff by stating that the plaintiff's cough symptoms continued, despite the regimen of prescribed medication. Relying on the results of the pulmonary function test performed on August 14, 2008, Dr. Rosenberg concluded that the plaintiff had an obstructive defect that prevented him from returning to active duty as a firefighter.

¶ 15 In February 2009, the plaintiff began treating with Dr. Peter Werner, a pulmonary specialist. In a report dated February 5, 2009, Dr. Werner stated that the plaintiff has bronchial asthma and COPD as a result of his reported history of injury to his lungs as a result of exposure while firefighting. Although Dr. Werner stated that the pulmonary function test performed "within the last year" shows a moderate to severe degree of airways obstruction, he noted that the plaintiff's arterial oxygen saturation is normal at 99% and that the "air entry is surprisingly good, but some wheezing is appreciated." Dr. Werner expressed his opinion that the plaintiff should not return to firefighting because it could be life-threatening.

¶ 16 In April 2009, the plaintiff retained Dr. Alvin J. Schonfeld to examine him and diagnose his condition. In reaching his professional opinions, Dr. Schonfeld relied on the plaintiff's report that he had experienced two smoke inhalation episodes in 1988 and 1998, which subsequently caused him to develop a severe cough. The plaintiff claimed that, in 1988, he was rescued from a burning building, and he reported to Dr. Schonfeld that he had experienced post-tussive syncope about six times since 1998. Dr. Schonfeld concluded that the plaintiff had an acute chemical injury to his lungs in 1988, but this conclusion was based on the plaintiff's statements alone and not on any objective medical evidence that such an event occurred. Dr. Schonfeld agreed that the plaintiff's condition had not improved in response to the multiple medicines that has been prescribed for him. Dr. Schonfeld diagnosed the plaintiff with reactive airways dysfunction syndrom (RADS) caused by the two acute inhalation incidents, which were reported to him by the plaintiff, and by chronic low level exposure to smoke and fumes as a firefighter. According to Dr. Schonfeld, the RADS then caused the plaintiff to develop COPD. He recommended that the plaintiff be "medically retired"

from firefighting duties.

¶ 17 Dr. Schonfeld admitted that the pulmonary function test performed in December 2007, was invalid, and that the plaintiff gave him a different history than he gave to Dr. Moisan. Dr. Schonfeld also acknowledged that, when he examined the plaintiff on April 6, 2009, his lungs were clear and no wheezing was heard.

¶ 18 The Board presented the report of Dr. Moisan, who found that, when he examined the plaintiff on March 11, 2009, his lungs were completely clear. In addition, a cardiac examination revealed a regular rhythm with a slight tachycardia, but no significant ectopy or murmur. Dr. Moisan reported that, during the examination, the plaintiff demonstrated intense coughing, but it appeared to be "self-generated" and ceased when the plaintiff was distracted from the examination. Dr. Moisan characterized the prior pulmonary function tests as "totally unusable spirometric tracings for which no diagnosis of obstructive disease can be made." Dr. Moisan concluded that the plaintiff has pansinusitis, but his cough "seems to be aggravated by volitional factors *** and there is nothing historically, on exam, or in the records which suggest that he truly has COPD or even asthma." Dr. Moisan opined that, although the plaintiff is impaired from fire-suppression tasks due to his protracted coughing and the potential for tussive syncope, there was no documentation indicating that he suffered from an airways disease that was caused by his occupation. After performing a pulmonary function test, Dr. Moisan found that the plaintiff's lung volumes and diffusion were normal, as were his airway conductance and resistance studies. Based on these test results, Dr. Moisan found that there was no evidence the plaintiff suffered from airway obstructive disease.

¶ 19 Dr. Motto, who has been the physician consultant to the Fund for over 35 years, examined

the plaintiff, reviewed medical records, and heard or reviewed all of the testimony presented to the Board. During his examination, of the plaintiff, Dr. Motto found that his lungs were clear. Dr. Motto expressed his opinion that the plaintiff is able to perform his assigned duties with the Department, and that he did not believe that the plaintiff has an occupational disease as described in section 6-151.1 of the Code. Dr. Motto premised his opinion on the plaintiff's medical records, his own examination and evaluation of the plaintiff, and Dr. Moisan's conclusions. He also testified that his opinion was further supported by the lack of an established connection between the plaintiff's occupation and his condition, as well as the plaintiff's own statement that he had never been removed from fire duty because of his condition.

¶ 20 Dr. Motto expressed confusion about the plaintiff's claim that his cough had progressively worsened even though he had undergone intensive treatment regimens and his exposure had diminished. In Dr. Motto's opinion, this indicated that the plaintiff had not been properly diagnosed. Dr. Motto further stated that, in his entire experience, he has never seen a firefighter who was disabled as a result of coughing. Dr. Motto also testified that sinusitis is not a medical impairment that would render a firefighter disabled. He also stated that he did not think pansinusitis was disabling, especially considering the modern treatments that are available. Dr. Motto expressed his opinion that pansinusitis did not prevent the plaintiff from performing his firefighting duties because that condition was treatable, and the plaintiff's own testimony that his condition worsened despite being treated with sinus medications suggested that was not the cause of his respiratory problem.

¶ 21 The documentary evidence presented at the hearing included the Department's reports of the plaintiff's employment injuries, as well as a record of the dates on which he was placed on medical

leave and the reasons for such leave. The reports pertaining to a medical leave in March 1988 reflect that the plaintiff suffered from right basilar pheumonitis, which is alternately characterized as an "on-duty" and an "off-duty" illness in different documents. The reports relating to a medical leave in July 1998 indicate that, while responding to a fire, the plaintiff encountered "smokey conditions," fell on his shoulder, knocked off his mask and helmet, and scratched his left eye. These reports reflect that the plaintiff sustained a left corneal abrasion and a right shoulder strain, but there is no indication that the plaintiff had complained of or been treated for smoke inhalation.

¶ 22 At the conclusion of the hearing, the Board found that the plaintiff had not sustained his burden of proving that he suffered from an occupational disease disability and denied his claim for benefits under the Code.

¶ 23 On administrative review, the circuit court initially issued an order on December 3, 2010, which reversed the Board's decision and remanded the matter to the Board for a new evidentiary hearing. The circuit court's decision was premised on the fact that the plaintiff had been denied his right to select the doctor who would render a second opinion. The plaintiff filed a notice of appeal challenging the December 3 order.[1] However, after the filing of the plaintiff's notice of appeal, the Board timely filed a motion for reconsideration in the circuit court. The circuit court granted the motion to reconsider and affirmed the Board's decision denying the plaintiff's application for benefits. This appeal followed.

¶ 24 The Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2008)) governs judicial

[1] This appeal, docketed as No. 1-10-3719, was dismissed for lack of appellate jurisdiction. See 2012 IL App (1st) 103719-U.

review of Board proceedings conducted under the Code. 40 ILCS 5/6-222 (West 2008). In such actions, our role is to review the decision of the Board, not the decision of the circuit court. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531-32, 870 N.E.2d 273 (2006). The Board's factual findings are *prima facie* true and correct (735 ILCS 5/3-110 (West 2008)) and will be reversed only if they are against the manifest weight of the evidence. *Kouzoukas v. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 463, 917 N.E.2d 999 (2009). Questions of law, such as statutory interpretation, are reviewed *de novo*, while mixed questions of law and fact are reviewed under the clearly erroneous standard. *Kouzoukas*, 234 Ill. 2d at 463. In interpreting a statute, this court's function is to ascertain and give effect to the intent of the legislature (*Quad Cities Open v. City of Silvis*, 208 Ill. 2d 498, 508, 804 N.E.2d 499 (2004)), and the best indication of that intent is the language of the statute itself (*People ex rel. Ryan v. Agpro, Inc.*, 214 Ill. 2d 222, 226, 824 N.E.2d 270 (2005)). Consequently, where the language of a statute is clear and unambiguous, we must give effect to the plain and ordinary meaning of the language used. *Quad Cites Open*, 208 Ill. 2d at 508. In addition, we have a duty to examine the procedural methods employed at the administrative hearing and to insure that the proceedings were fair and impartial, in accordance with the fundamental principles of due process of law. See *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 92-93, 606 N.E.2d 1111 (1992); see also *O'Callaghan v. Retirement Board of Firemen's Annuity and Benefit Fund of Chicago*, 302 Ill. App. 3d 579, 586, 706 N.E.2d 979 (1998).

¶ 25 On appeal, the plaintiff argues that the Board violated section 6-153 of the Code by denying him the right to choose the doctor who would render a second opinion regarding his disability and

by requiring that he submit to an examination by Dr. Moisan for that purpose. In a related argument, the plaintiff contends that the Board deprived him of due process by refusing his request to choose the second-opinion doctor and then denying his application for benefits on the ground that he failed to present evidence of his disability by a physician appointed by the Board, as required by section 6-153 of the Code (40 ILCS 5/6-153 (West 2008)).

¶ 26 In response, the Board contends that its referral to Dr. Moisan was not for a second opinion, but for an IME, as authorized under its administrative rules. The Board claims that Dr. Moisan's evaluation could not be a second opinion because no previous opinion had been rendered, where the earlier report by Dr. Motto did not consist of a medical opinion regarding the plaintiff's disability. According to the Board, because the referral to Dr. Moisan was for an IME, the plaintiff did not have a statutory right to choose the doctor who would perform that examination. The Board counters the plaintiff's due process argument by asserting that its conduct of the administrative proceedings did not prevent the plaintiff from presenting the testimony of a Board-appointed physician.

¶ 27 Section 6-153 of the Code provides, in relevant part, as follows:

> "[i]n cases where the Board requires the applicant to obtain a second opinion, the applicant may select a physician from a list of qualified licensed and practicing physicians which shall be established and maintained by the board." 40 ILCS 5/6-151.1 (West 2008).

This statutory provision clearly and unambiguously requires that the claimant be allowed to choose the doctor who will render a second opinion where such opinion is required by the Board. See *Flaherty v. Retirement Board of Policemen's Annuity and Benefit Fund-City of Chicago*, 311 Ill.

App. 3d 62, 66-67, 724 N.E.2d 145 (1999); *McManamon v. Retirement Board of Policemen's Annuity and Benefit Fund of City of Chicago*, 298 Ill. App. 3d 847, 854-55, 699 N.E.2d 1075 (1998). In this case, the relevant question is whether the Board's referral of the plaintiff to Dr. Moisan in January 2009 amounts to a demand for a second opinion.

¶ 28 The record reveals that on November 18, 2008, Dr. Motto prepared a report to the Board, in which he outlined his evaluation of the plaintiff. In describing his physical examination, Dr. Motto stated that the plaintiff "had paroxysms of coughing" and further stated that his "lungs were remarkably clear although he does have a history of wheezing." In the "Comment" portion of his report, Dr. Motto stated that "[p]ulmonary function tests suggest obstructive disease." Based on these statements, we think it is evident that Dr. Motto did render an opinion with regard to the plaintiff's medical condition and that the referral to Dr. Moisan was for a second opinion. In accordance with the clear and unambiguous language in section 6-153, the plaintiff should have been permitted to choose the physician who would render the second opinion required by the Board, and the evidence of Dr. Moisan's examination and opinion should have been excluded. We conclude, therefore, that the cause must be remanded for further proceedings, during which the plaintiff is permitted to select the Board-appointed doctor who will render a second opinion and to present evidence of that examination and opinion, which may be commented upon or rebutted by witnesses for the Board.

¶ 29 However, contrary to the plaintiff's assertion, the opinion of Dr. Motto is not subject to exclusion merely because he considered Dr. Moisan's report. The record affirmatively establishes that, in forming his opinion, Dr. Motto relied on his own examination of the plaintiff, as well as the

records of previous treatment and the opinions and reports of the other examining physicians. In addition, the record demonstrates that Dr. Motto appeared and testified before the Board, and the basis and validity of his opinion were fully explored on cross-examination.

¶ 30 We acknowledge our prior decisions in *McManamon* and *Flaherty* held that, when a claimant had been denied his statutory right to select a second-opinion doctor, the appropriate remedy is to exclude the medical evidence tendered by the physician chosen by the Board. See *Flaherty*, 311 Ill. App. 3d at 66-67; *McManamon*, 298 Ill. App. 3d at 854-55. In each of those cases, the reviewing court did not remand for further proceedings, but instead evaluated the propriety of the Board's decision without consideration of the opinion rendered by the doctor designated by the Board. See *Flaherty*, 311 Ill. App. 3d at 66-67; *McManamon*, 298 Ill. App. 3d at 854-55. However, there is no indication that the claimants in *McManamon* and *Flaherty* argued that the Board's conduct had deprived them of the right to due process. Consequently, the rule applied in *McManamon* and *Flaherty* does not govern this case. See generally *Village of Maywood Board of Fire and Police Commissioners v. Department of Human Rights*, 296 Ill. App. 3d 570, 581, 695 N.E.2d 873 (1998) (distinguishing prior decisions in which the relevant issue was not raised). Because we cannot say how the Board would have ruled if Dr. Moisan's evidence had been excluded and the opinion of a different Board-appointed doctor, chosen by the plaintiff, had been introduced, the cause must be remanded to the Board for further proceedings and a new decision by the Board.

¶ 31 For the foregoing reasons, we reverse the circuit court's judgment confirming the denial of benefits, vacate the Board's decision, and remand the matter to the Board for further proceedings to allow the plaintiff to select the doctor who will render a second opinion and to present additional

evidence based on that examination and opinion.

¶ 32 Circuit court reversed; Board decision vacated; cause remanded to the Board for further proceedings, with directions.