2014 IL App (1st) 132862-U

FIFTH DIVISION
June 30, 2014

No. 1-13-2862

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STUART PERSKY, Plaintiff-Appellant, v. RIVERSIDE POLICE PENSION BOARD, WILLIAM GUTSCHICK, President, CLAUDE CIMA, Vice President, JEFF MILLER, Secretary, STEVE EGAN, Assistant Secretary, MATT CONNELLY, Trustee, and CARY COLLINS, Attorney for RIVERSIDE POLICE PENSION BOARD, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 13 CH 03665 Honorable LeRoy K. Martin, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: The Riverside Police Pension Board's decision to revoke plaintiff's disability pension was not against the manifest weight of the evidence when sufficient evidence supported the doctor's certification that plaintiff was no longer disabled.

¶ 2 Plaintiff Stuart Persky appeals from the circuit court's order affirming the administrative decision of defendants, Riverside Police Pension Board (the Board) and its members, terminating plaintiff's duty disability pension in January 2013 after they found that plaintiff had fully recovered from his August 2000 injury and was no longer disabled. On appeal, plaintiff argues

that the Board's decision to terminate his duty disability pension was against the manifest weight of the evidence.

¶ 3 Plaintiff was hired as a patrolman with the Village of Riverside police department in July 1991. On August 2, 2000, plaintiff injured his right knee during a defense tactical training session. He was trying to do a gun-grab demonstration when his partner fell on plaintiff's knee. Plaintiff fell and twisted his right knee. He was taken to the emergency room.

¶ 4 On August 8, 2000, plaintiff was seen by Dr. G. Klaud Miller, who diagnosed him with an anterior cruciate ligament (ACL) and medial collateral ligament (MCL) injury. Dr. Miller operated on plaintiff on September 15, 2000, to repair and reconstruct his right knee. Dr. Miller's post-operative diagnosis was a Grade III tear of the right MCL and ACL. Dr. Miller examined plaintiff in December 2001. He observed that plaintiff's recovery was "clearly much slower than statistical average," noting that he was "not sure how much of his psychological condition is contributing to his overall problem. However, his new complaint of having pain simply when his clothes are tough on the skin is classic for a reflex sympathetic dystrophy (RSD)." Dr. Miller recommended that plaintiff see a pain specialist.

¶ 5 Plaintiff was referred to three physicians prior to the Board's determination whether plaintiff was entitled to duty disability pension. In April 2001, plaintiff was seen by Dr. Brian Cole, an orthopedic surgeon. Dr. Cole observed that plaintiff had done well with physical therapy, but he has "a persistent complaint of sitting for prolonged periods of time leading to stiffness. He also complains of early fatigue." Dr. Cole recommended that plaintiff "would not return to full duty without restrictions at this time," but Dr. Cole said that he would "anticipate that over the next four to eight weeks that [plaintiff] could return to full duty." Dr. Cole examined plaintiff again in July 2001. Dr. Cole noted that plaintiff complained of "persistent

knee discomfort, which is subjective in nature," but plaintiff's "ACL is intact." Dr. Cole recommended a functional capacity evaluation (FCE) and opined that plaintiff would probably "have a difficult time working as a police officer." Plaintiff was examined by Dr. Cole a third time in January 2002. Dr. Cole found that plaintiff had subjective complaints of pain and recommended seeing a pain specialist to determine whether he had a "sympathetically-mediated response." He noted that "from an orthopedic point of view, [he thought plaintiff's] care has been appropriate and skillfully performed. He has had no deviations from care and he actually has had an excellent objective result."

¶ 6 In February 2002, plaintiff was referred to Dr. John Stamelos, an orthopedic surgeon. Based on his examination and plaintiff's history, Dr. Stamelos opined that "it is clearly evident that [plaintiff] is currently disabled from police service. I would anticipate his current level of disability to be at least one year pending a response to future treatments for a pain syndrome, which is clearly evident on this exam."

¶ 7 Also in February 2002, plaintiff was examined by Dr. S.I. Yen, an orthopedic surgeon. Based on his examination, Dr. Yen "highly suspect[ed] that [plaintiff] has sustained a post surgical RSD and [he] believe[d] this is a major reason for [plaintiff] being unable to perform his regular work. This would also explain the degree of pain he is experiencing. The knee joint examination itself shows a perfect result from surgical intervention." Dr. Yen recommended "light desk duty work with limited standing, walking" and "further work status will depend on his progress." Dr. Yen prepared a certificate of disability, finding that plaintiff is certified "temporarily" disabled from police service. Dr. Yen struck the word "permanently" and added, "temporarily- can do light desk work w/limited standing, walking."

¶ 8 In February and March 2002, plaintiff was examined by Dr. Asokumar Buvanendran, an anesthesiologist and pain specialist, to determine whether plaintiff had RSD. A thermogram was done in the doctor's office and he found that the result was "not consistent with regional pain syndrome" as well as a bone scan which was also "inconsistent with complex regional pain syndrome." Dr. Buvanendram found that "the patient, more than likely, has a minor degree of inflammation surrounding his knee, acute or chronic. It is my belief that the patient would not benefit from therapy related to complex regional pain syndrome, and he was thus discharged from our care today on mild anti-inflammatory agents."

¶ 9 Following his examination by Dr. Buvanendram, plaintiff again was examined by Dr. Miller in April and May 2002. Dr. Miller gave plaintiff a cortisone injection in April. At the May visit, plaintiff informed Dr. Miller that the injection only alleviated about 20 percent of his pain. Dr. Miller prepared a certificate of disability, finding that plaintiff "was not certified as permanently disabled from police service."

¶ 10 In May 2002, plaintiff was examined by Dr. Bryan Neal, an orthopedic surgeon. Dr. Neal noted that the surgical procedure was "well performed" and he did not believe that plaintiff "has significant ACL instability or symptoms at this time." He diagnosed plaintiff with "chronic post traumatic/post surgical pain of unknown etiology." Dr. Neal stated that his opinion was that plaintiff was "disabled from police service," and he believed that plaintiff "could be labeled as permanently disabled for the time being although it is possible that over the next few years his pain could diminish and his capacity improved such that this classification could be withdrawn."

¶ 11 The Board conducted a hearing on plaintiff's disability application in June 2002. The Board granted plaintiff a duty-related disability pension, effective June 8, 2002, with plaintiff to be examined at least once a year until he reaches age 50.

¶ 12 In March 2008, plaintiff was examined by Dr. Stamelos at the Board's request. Dr. Stamelos had not examined plaintiff since 2002. Plaintiff did not bring any additional records to the examination. Plaintiff informed the doctor that he had reached maximum medical improvement (MMI) in 2005 or 2006 "at which time therapy and further treatment for his right knee was discontinued." Plaintiff also told the doctor that he has been working for two and a half years on a part time basis routing trips for Harley Davidson. When asked if he rides a motorcycle, plaintiff said "occasionally he may when he wears his knee brace but he cannot do that on a daily basis." Plaintiff also worked a sedentary part time job scheduling deliveries and routes for a trucking company.

¶ 13 Plaintiff told the doctor that his right knee "has extreme sensitivity to cold weather and to touch. He denies any locking or giving out. He does feel that sometimes the knee is unstable." Dr. Stamelos found that plaintiff "had a normal gait when coming into the office" as he stood in the reception area speaking with staff. Dr. Stamelos's impression was that plaintiff sustained "some type of atypical regional pain syndrome. It did not follow the criteria of any sympathetic knee pain syndrome but more of a regional pain syndrome that has more of a functional component with subjective rather than objective findings." Further, "there appears to be no evidence of any objective findings on his examination to corroborate his pain as described." Dr. Stamelos found plaintiff "to be disabled from his duties as a police officer based on his functional overlay and his subjective complaints of pain pending his [FCE] evaluation as well as a MMI psychological evaluation regarding his condition of ill being at this time."

¶ 14 A FCE was performed in February 2009. The recommendation was that plaintiff "was able to perform at sedentary/light level on physical demand scale giving poor effort during today's FCE testing." The report noted that while plaintiff was able to lift 25 pounds at waist

level and 10 pounds from the floor and knee level, plaintiff was "unsafe when lifting and does not perform proper body mechanics. He was very protective of using his right knee during any squatting or stooping activities." The report also noted that "the limiting factor seems to be mostly pain, weakness and dizziness that he complained of after lifting or bending," but his heart rate "was not consistent with increase of those complaints." Following the FCE, Dr. Stamelos submitted a report based on the results. Based on the FCE assessment, he opined that it "showed physical impairment that would limit [plaintiff's] ability to perform the duties of a police officer."

¶ 15 Plaintiff was next examined by Dr. George Charuk in April 2010. Another FCE was performed in August 2010. The recommendations noted that plaintiff

> "demonstrated a tendency toward a submaximum physical test effort and a number of inconsistencies during testing. This makes the accuracy of the above test results questionable. Regardless, his demonstrated work tolerance at the light physical demand level for work on an occasional basis and the sedentary physical demand level on a frequent basis falls below the heavy level reportedly required for a police officer. Therefore, a full duty cannot be recommended by us based solely upon his demonstrated work tolerance levels."

¶ 16 Dr. Charuk submitted a report following his review of the FCE. He noted plaintiff's inconsistency with his efforts, but agreed that full-time duty could not be recommended based on his demonstrated work tolerances. He noted that he continued "to believe that [plaintiff] is not certified as a permanent disability from police service at this time." He opined that plaintiff was "temporarily disabled for the next year."

¶ 17 In March 2012, plaintiff was examined by Dr. David Fletcher, an occupational medicine physician. Dr. Fletcher found in his report that plaintiff complained of "instability of the right knee and as well as clicking, catching, and locking in the right knee." Dr. Fletcher opined that "the ACL reconstruction has held up without any evidence of instability or disruption of that repair." Plaintiff indicated that he did not have any active care going on at the time of his visit and he did not wear a knee brace. He noted there was a gap in care from 2002 to 2008. Dr. Fletcher opined that there appeared to be "pain behavior present." Plaintiff's gait was inconsistent and he complained of pain in his right ankle following a fracture, but Dr. Fletcher opined that his exam of plaintiff's right ankle was "fraught with symptom magnification." Dr. Fletcher opined that "permanent job restrictions are not necessary based on his objective exam." Dr. Fletcher's prognosis was that plaintiff "was MMI a long time ago but [plaintiff] will continue to profess he is disabled as a result of his injury." Based on his examination, Dr. Fletcher prepared a physician's certificate of disability that plaintiff was not certified as permanently disabled from police service.

¶ 18 In June 2012, Dr. Miller submitted a letter to the Board stating that in his opinion, plaintiff's "right knee and leg will not allow him to return to street police work. In [his] opinion, [plaintiff] will be a danger to himself, his partner, and the public. His right leg will simply not function at a high enough level to allow him to safely return to his old job."

¶ 19 In July 2012, plaintiff performed another FCE. The result of the FCE was that plaintiff "demonstrated an ability to function in the medium physical demand level" based on lifting from 24 inches to overhead and carry less than 5 feet. Plaintiff "did not demonstrate the ability to tolerate frequent lifting, carrying, pushing or pulling. The client exhibited a low tolerance for

standing and walking activities. He was observed to take frequent breaks to lean on stationary objects or sit. His test performance was consistent."

¶ 20 Also in July 2012, the Board conducted a hearing regarding plaintiff's duty disability pension. Dr. Fletcher did not appear in person, but gave testimony over the telephone. He gave testimony consistent with his findings after examining plaintiff. He testified that he examined plaintiff's history and the findings of prior physicians that plaintiff suffered from subjective pain stemming from his knee injury. Dr. Fletcher found that when he examined plaintiff's knee, he found it "was completely stable." He also "found no clinical signs of reflex sympathetic dystrophy, did not find any atrophy."

¶ 21 Dr. Fletcher videotaped plaintiff's gait for approximately a minute while plaintiff walked up and down the hallway. Dr. Fletcher described plaintiff as having "a very bizarre, inconsistent gait and was --- basically, had to lean on the side of a wall to ambulate throughout [his] office." The doctor could not find an objective basis for plaintiff's complaints. Dr. Fletcher also viewed a surveillance video taken of plaintiff walking the same day of his examination. In that video, plaintiff was "walking normally" and "one cannot discern any kind of functional impairment." The videotape with plaintiff walking in Dr. Fletcher's office and the surveillance video were played for the Board at the hearing.

¶ 22 When asked about Dr. Miller's recent opinion that plaintiff could not return to work, Dr. Fletcher said his opinion remained unchanged because Dr. Miller was "making his opinion based on [plaintiff's] subjective complaints." He also noted that Dr. Miller did not have the benefit of the video, which he believed would alter Dr. Miller's opinion. During cross-examination, plaintiff's counsel highlighted the fact that Dr. Fletcher was not an orthopedic surgeon, but Dr.

Fletcher remained firm on his opinion. He did admit the video did not show plaintiff climbing stairs, pulling 100 pounds, or running after a prisoner.

¶ 23 Dr. Fletcher was also asked about FCE that was done the week prior to the hearing. Dr. Fletcher testified that the FCE "did some strength testing," but they did not "do any coefficient of variance to look for accuracy, for validity, which is one of the most important aspects for using a functional capacity evaluation as a tool to make opinions."

¶ 24 In January 2013, the Board issued its written decision, concluding that plaintiff was "no longer disabled and has recovered from his disability" and that plaintiff "has faked or exaggerated his symptoms for as long as the past ten years." The Board found that "Dr. Fletcher's findings were supported by other physicians who questioned [plaintiff's] subjective complaints which were not supported by objective findings." The Board also found that its view of the videos "had clearly shown that [plaintiff] was unreliable and fraudulent in his testimony." The Board attached an advertisement to its decision which showed plaintiff on a motorcycle with text advertising plaintiff as a motorcycle guide for three years and noted that in 2008, Dr. Stamelos had asked plaintiff about his motorcycle habits after viewing this advertisement. The text also noted that plaintiff worked as a truck driver. "The Board also found lack of on-going treatment by [plaintiff] did not support his claims that his knee injury was so severe that he had not recovered or stabilized from his original injury. The Board also found [plaintiff's] testimony and complaints of pain were not creditable." The Board concluded that plaintiff was not eligible for duty-related disability benefits.

¶ 25 In February 2013, plaintiff filed a petition for administrative review in the circuit court, requesting the court to review the record and reverse the findings of the Board. In August 2013,

the circuit court affirmed the findings of the Board, noting that the Board's decision was not against the manifest weight of the evidence.

¶ 26 This appeal followed.

¶ 27 On appeal, plaintiff argues that the Board erred in finding that he was not disabled and ineligible to receive duty disability benefits.

¶ 28 When a party appeals the circuit court's decision on a complaint for administrative review, the appellate court's role is to review the administrative decision rather than the circuit court's decision. *Siwek v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 324 Ill. App. 3d 820, 824 (2001). The Administrative Review Law provides that judicial review of an administrative agency decision shall extend to all questions of law and fact presented by the entire record before the court. 735 ILCS 5/3-110 (West 2012). "In an action under the Administrative Review Law, factual determinations by an administrative agency are held to be *prima facie* true and correct and will stand unless contrary to the manifest weight of the evidence." *Kimball Dawson, LLC v. City of Chicago Department of Zoning*, 369 Ill. App. 3d 780, 786 (2006); see also 735 ILCS 5/3-110 (West 2012). The supreme court "has held that ' "the question of whether the evidence of record supports the Board's denial of plaintiffs application for a disability pension" ' is a question of fact and, as such, the manifest weight standard of review applies." *Kouzoukas v. Retirement Board of Policemen's Annuity and Benefit Fund of City of Chicago*, 234 Ill. 2d 446, 464 (2009) (quoting *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 505 (2007), quoting *Marconi v. Chicago Heights Police Pension Board*, 225 Ill.2d 497, 534 (2006)).

¶ 29 A reviewing court must give deference to the administrative agency's interpretation of the statute it was created to enforce because the agency makes informed decisions based on its

experience and expertise. *Illinois Council of Police v. Illinois Labor Relations Board*, 387 Ill. App. 3d 641, 660 (2008). "To find a determination against the manifest weight of the evidence requires a finding that all reasonable people would find that the opposite conclusion is clearly apparent." *Kimball Dawson*, 369 Ill. App. 3d at 786. "[T]he plaintiff in an administrative hearing bears the burden of proof and relief will be denied if the plaintiff fails to sustain that burden." *Kouzoukas*, 234 Ill. 2d at 464. "Simply put, if there is evidence of record that supports the agency's determination, it must be affirmed." *Kimball Dawson*, 369 Ill. App. 3d at 786 (citing *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992)).

¶ 30 Here, plaintiff argues that the Board erred in its reliance on Dr. Fletcher's testimony and opinion in contrast to the opinions of the doctors who had treated plaintiff in the previous ten years. Plaintiff also attempts to discount Dr. Fletcher's opinion because he was not an orthopedic surgeon when the previous physicians were. The Board maintains that Dr. Fletcher's finding that plaintiff was no longer disabled is supported by plaintiff's medical history of subjective pain and inconsistent efforts in a prior FCE.

¶ 31 Section 3-115 of the Illinois Pension Code provides:

> "A disability pension shall not be paid unless there is filed with the board certificates of the police officer's disability, subscribed and sworn to by the police officer if not under legal disability, or by a representative if the officer is under legal disability, and by the police surgeon (if there be one) and 3 practicing physicians selected by the board. The board may require other evidence of disability. Medical examination of a police officer retired for disability shall be made at least once each year prior to attainment

> of age 50, as verification of the continuance of disability for service as a police officer. No examination shall be required after age 50." 40 ILCS 5/3-115 (West 2012).

¶ 32 "A police officer's entitlement to disability benefits is contingent on his continued disability, and the Board may revoke those benefits if he has recovered from the disability." *Peacock v. Board of Trustees of Police Pension Fund*, 395 Ill. App. 3d 644, 652 (2009). Under section 3-116 of the Illinois Pension Code, if a police officer is found upon medical examination to have recovered from a disability, the Board shall certify to the chief of police that the officer is no longer disabled and is able to resume the duties of his or her position. 40 ILCS 5/3-116 (West 2012). "Disability benefits may be revoked on the basis of a single medical examination finding that the officer is no longer disabled." *Peacock*, 395 Ill. App. 3d at 652 (citing *Trettenero v. Police Pension Fund of City of Aurora*, 333 Ill. App. 3d 792, 800 (2002)).

¶ 33 We find that the Board's decision to revoke plaintiff's pension was not against the manifest weight of the evidence. Contrary to plaintiff's assertion, the Board did not ignore plaintiff's prior medical history. The Board detailed plaintiff's medical history, noting the previous physicians' notes that plaintiff's ACL reconstruction was "perfect," "well performed," and had held up without any evidence of instability. All of the examining physicians had found that there was nothing objectively wrong with plaintiff's right knee, but it was only his subjective complaints of pain that rendered him temporarily disabled. We also point out that none of the prior physicians concluded that plaintiff was permanently disabled, but instead found that he was temporarily disabled and should be reexamined in the future to determine if he had recovered.

¶ 34 In 2008, Dr. Stamelos noted that the objective findings were "inconsistent" with plaintiff's complaints of pain. Plaintiff's knee showed no signs of instability and he had full

range of motion. A FCE performed in 2009 found that plaintiff made a poor effort and again in 2010, his efforts were inconsistent and constituted a "submaximal physical effort" in a FCE.

¶ 35 Plaintiff's medical history also showed that he was inconsistent in seeking care for his knee despite his complaint of significant pain and its effect on his daily life. His records showed a gap in treatment from 2002 to 2008. He also admitted that he did not wear a knee brace. Although he told Dr. Stamelos that he rode his motorcycle occasionally and with a knee brace, the advertisement viewed by the doctor and the Board indicated that plaintiff was working as a motorcycle guide.

¶ 36 Dr. Fletcher's examination took this medical history into account during his examination of plaintiff. Dr. Fletcher's opinion was consistent with the previous observations that plaintiff's knee was stable and his complaints of pain were subjective. Significantly, Dr. Fletcher based his opinion in part on his view of the videos in which plaintiff exhibited difficulty walking and needed to hold a rail while in the doctor's office, but a video from later on the street showed plaintiff's gait to be normal and showed no signs of the previous difficulty. The Board also viewed this video in reaching its determination. Dr. Fletcher opined that plaintiff was exaggerating his claims of pain. Dr. Fletcher also considered Dr. Miller's June 2012 report and the recent FCE, but he maintained that these documents did not change his opinion because the reports were based only on plaintiff's subjective complaints of pain and Dr. Miller did not have the benefit of viewing the video.

¶ 37 Plaintiff relies on the supreme court's decision in *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485 (2007) for support. In that case, the pension board denied the plaintiff's initial application for a duty disability pension following the plaintiff's knee injury when he fell down an embankment while on duty. The record showed that four physicians had

examined the plaintiff and found him to be disabled, but a fifth doctor disagreed. The board discounted the majority of the evidence and relied on the dissenting doctor to deny the plaintiff's disability application. Wade, 226 Ill. 2d at 491-501. The supreme court reversed the board's conclusion, finding

> "the reports of these doctors evince examinations more thorough than that conducted by [the dissenting doctor,] and analyses that were more complete and better substantiated. We note that we have before us the same records and reports examined by the Board; the doctors did not testify, and thus factors such as the demeanor of testifying witnesses does not figure into an assessment of credibility. Having thoroughly examined those records, we find it, frankly, incomprehensible that the Board would credit the opinion of [the dissenting doctor] and reject the opinions of the other doctors." *Id.* at 506.

¶ 38 We find *Wade* to be distinguishable from the instant case. First, we observe that the case involved the initial determination of whether the plaintiff was entitled to the duty disability pension, rather than an evaluation as to whether the plaintiff continued to be disabled, as in this case. There, the board ignored substantial medical evidence from four physicians in favor of a conclusion from one physician that the plaintiff was not disabled. Here, the Board reviewed plaintiff's extensive medical history, which included multiple doctors finding that plaintiff was only temporarily disabled. Further, in *Wade*, the physicians' examinations of the plaintiff were contemporaneous to his injury and his application for the disability pension. In the present case, plaintiff relies significantly on older opinions from physicians from his initial application in his

assertion that six orthopedic surgeons concluded that he was disabled. This assertion, while correct in theory, misconstrues his medical history. Most of the doctors had not examined plaintiff again and only Dr. Miller offered a current opinion that conflicted with Dr. Fletcher's opinion. Moreover, as we previously detailed, the prior physicians had noted plaintiff's inconsistent complaints in light of his objectively repaired and stable knee. In addition, the videos of plaintiff showed exaggeration of his injuries and the lack of a permanent disability.

¶ 39 Plaintiff also cites *Kouzoukas* to support his position that a subjective complaint of pain can support a disability finding for a pension. However, in that case, there was a disagreement between three physicians in determining whether the plaintiff was disabled in her initial application for a disability pension. In its findings, the pension board simply concluded that "the medical records and testimony offered does not have any objective findings of a back, spine or SI joint injury; Kouzoukas' complaints of pain are subjective and do not prevent her full duty return" to the Chicago police department. *Kouzoukas*, 234 Ill. 2d at 461. None of the physicians opined that the plaintiff was exaggerating her pain or malingering. *Id.* at 457. In the present case, the Board did not find that plaintiff's subjective complaints were not sufficient to merit a disability pension.

¶ 40 Rather, the Board noted plaintiff's medical history which had previously indicated inconsistencies and exaggerations in his complaints of pain as well as poor and inconsistent efforts in his performance of FCE. Plaintiff had been evaluated by a pain specialist and determined not to have a complex regional pain syndrome. Dr. Fletcher's opinion was based on plaintiff's extensive history and his own observations. The video supported Dr. Fletcher's conclusion that plaintiff exaggerated his difficulty in walking while in the doctor's office. Based on the record before us, including plaintiff's extensive medical history, we find there was

sufficient competent evidence to support the Board's decision. Accordingly, we cannot say that the Board's conclusion to revoke plaintiff's disability pension was against the manifest weight of the evidence.

¶ 41 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County upholding the Board's decision to revoke plaintiff's duty disability pension.

¶ 42 Affirmed.