

2014 IL App (1st) 133972-U

No. 1-13-3972

September 30, 2014

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

LT. JOSEPH C. CARPINO, JR.,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 12 CH 40356
)	
BOARD OF TRUSTEES OF THE)	
NORWOOD PARK FIRE PROTECTION)	The Honorable
DISTRICT FIREFIGHTERS' PENSION)	Diane Larsen,
FUND,)	Judge presiding.
)	
Defendant-Appellee.)	

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Where two of three independent medical examiners found the appellant not disabled, and the examiners had not misconstrued the medical records, the Pension Board's finding that the appellant did not meet his burden of proving himself disabled was not contrary to the manifest weight of the evidence.

¶ 2 The Board of Trustees of the Norwood Park Fire Protection District Firefighters' Pension Fund (Pension Board) denied Joseph Carpino's application for disability benefits. In this appeal, Carpino argues that this court should reverse the Pension Board because the independent medical examiners on whom the Pension Board relied had no sound basis for their opinion that Carpino could perform the work of a firefighter. We hold that the Pension Board's finding is not contrary to the manifest weight of the evidence, and therefore we affirm the Pension Board's order.

¶ 3 BACKGROUND

¶ 4 On March 5, 2010, Carpino, a firefighter for the Norwood Park Fire Protection District, responded to a call. After he returned to the station, he went to the hospital and began a course of treatment for back pain. Carpino had suffered some back pain before March 2010. After the incident on March 5, 2010, Carpino's chiropractor found that Carpino had low back pain and a decreased range of motion. The chiropractor prescribed a home exercise regimen.

¶ 5 A pain management specialist started to treat Carpino in May 2010, because the chiropractor's treatments had not alleviated the pain. The pain specialist administered epidural steroid injections, which temporarily alleviated the pain. However, the pain returned when Carpino attempted physical therapy.

¶ 6 Dr. Kern Singh, a spinal surgeon, examined Carpino in July 2010. Dr. Singh found some disc herniation and spinal cord compression. He recommended back surgery. Carpino underwent the recommended surgery in December 2010. In January 2011, Dr. Singh reported that Carpino could return to light duty work as long as he lifted no more than 10 pounds, with minimal bending and squatting. Scans showed that Carpino's back had healed

well. By April 2011, Dr. Singh found that Carpino could safely lift up to 20 pounds. In a report dated April 2011, Dr. Singh said, "[Carpino] has put forth moderate effort in physical therapy. Objective testing does not match subjective complaints."

¶ 7 A physical therapist performed a functional capacity evaluation for Carpino in August 2011. The therapist reported:

"Consistency of effort is determined by evaluating heart rate, blood pressure, and a battery of objective tests. The overall results of this evaluation are questionable performance secondary to the varied effort demonstrated by Mr. Carpin[o] during his performance of a variety of functional tasks. ***

* * *

*** Mr. Carpino exhibited no increase in heart rate with resistive loading during static arm strength testing.

*** This examiner observed exaggerated expressions of pain during the functional simulation circuit, which reduced the client's safety and awareness, without observable physical signs present.

* * *

During this evaluation, Mr. Carpino frequently expressed subjective reports of neck pain without observable physical findings, tending to self limit progression of the loads in lifting or carrying. There was minimal increase in his heart rate during these incidents."

¶ 8 A second physical therapist, who helped Carpino on work hardening, reported that Carpino "demonstrated the ability to perform within the MEDIUM physical demand level," as he showed "the ability to perform 69.3% of the physical demands of [his] job as a Firefighter." The therapist added, "Given the fact that Mr. Carpino self terminated the Work Conditioning program, a Physical Demand Level cannot be determined beyond the Medium category of work. Based on this finding and the findings of inconsistent reliability of pain during the Functional Capacity Evaluation, Mr. Carpino is capable of functioning at greater functional abilities than demonstrated."

¶ 9 In his report dated September 29, 2011, Dr. Singh found that Carpino had achieved maximal medical improvement. On December 2, 2011, Carpino applied to the Pension Board for a disability pension. Three doctors performed independent medical evaluations of Carpino, and submitted their reports to the Pension Board. All three doctors personally examined Carpino and reviewed Carpino's medical records.

¶ 10 Dr. Babak Lami, an orthopedic surgeon, found that Carpino's "[e]xtension, lateral bending, and rotation are clinically full." Dr. Lami noted that the X-rays of Carpino's spine showed that the operation resulted in a successful spinal fusion. Dr. Lami reported:

"The postoperative x-rays demonstrate no evidence of complications. The postoperative myelogram also demonstrated no significant findings other than degenerative changes. His lumbar MRI also demonstrated only degenerative changes consistent with his age. His orthopedic and neurological examinations are normal. His disability is solely based on subjective complaints of pain. ***

In my clinical experience, treating and performing the same surgery, I cannot support that a two-level fusion performed without any complication can result in total disability. For me to support a disability for Mr. Carpino it requires more objective evidence. ***

* * *

*** In my opinion, Mr. Carpino is at maximum medical improvement. He should return to his previous job as a firefighter."

¶ 11 Dr. Gary Skaletsky, a neurosurgeon, disagreed with several of Dr. Lami's findings. Dr. Skaletsky found that Carpino had "a limited range of cervical and lumbar motion." Dr. Skaletsky noted that the Norwood Park Fire Protection District job description for firefighters requires an ability to perform "prolonged and arduous work under adverse conditions," and in his opinion, Carpino's limited range of motion prevented him from meeting this job requirement. Dr. Skaletsky agreed with Dr. Lami and Dr. Singh that Carpino could perform at a heavy work level, and he could perform all duties listed in the job description, except that he could not perform "prolonged and arduous work under adverse conditions."

¶ 12 Dr. Leon Huddleston, a rehabilitation expert, found only a "slightly decrease[d] range of motion in the cervical spine," and no other significant limits on Carpino's movements. Dr. Huddleston concluded, "There are no physical disabilities present. Based on my exam and the records reviewed, I believe that Lt. Carpino can perform full and unrestricted firefighter duties."

¶ 13 Only Carpino testified at the Pension Board hearing. He testified that he could not do the prescribed work hardening exercises. Persistent pain prevented him from returning to work.

Carpino presented a report from his treating physician, Dr. Thomas McNally, who opined that Carpino could not return to full duty work due to his subjective reports of pain.

¶ 14 On September 30, 2012, the Pension Board issued a written order denying Carpino's claim. The Pension Board said:

"[T]he Applicant was injured in the March 5, 2010, fall. *** [T]he injuries sustained in the incident were treated and the Applicant has since recovered. *** Two of the three independent physicians that have examined the Applicant in connection with his injuries have separately and independently concluded that the Applicant is not disabled. ***

* * *

While the Functional Capacity Evaluation undergone by the Applicant found that the Applicant could only work at the 'medium' physical demand level, that evaluation also noted significant issues with the effort put forth by the Applicant. Notably, the evaluation found 'questionable performance' by the Applicant. It noted varied effort and no increase in heart rate as objective findings in support of a questionable effort by the Applicant.

*** Of particular note is that Dr. McNally was a treating and not an independent physician and his opinion of disability was primarily based on subjective reports of pain[.] *** The Board elects to place greater weight on the opinions and conclusions of Dr. Huddleston and Dr. Lami. Both of those doctors concluded that the Applicant was not disabled and was capable of performing full and unrestricted firefighter duties."

¶ 15 Carpino sought judicial review of the Pension Board's decision. The circuit court affirmed the Pension Board's order. Carpino now appeals.

16 ANALYSIS

¶ 17 We adopt the following statement of applicable principles from *Lambert v. Downers Grove Fire Department Pension Board*, 2013 IL App (2d) 110824, ¶ 23:

"In an appeal from an administrative agency's decision, we review the agency's determination, not that of the trial court. [Citation.] The agency's factual determinations are held to be *prima facie* true and correct, and we will uphold those determinations unless they are against the manifest weight of the evidence. [Citation.] A factual finding is against the manifest weight of the evidence when the opposite conclusion is clearly apparent. *** In such proceedings, the plaintiff bears the burden of proof. [Citation.] If there is evidence of record that supports the agency's determination, it must be affirmed."

¶ 18 Carpino argues that the Pension Board should not have relied on Dr. Lami and Dr. Huddleston, and instead the Pension Board should have relied on Dr. Skaletsky and Dr. McNally. First, Carpino argues that only Dr. Skaletsky and Dr. McNally took into account the limitations on his range of motion. But Dr. Lami and Dr. Huddleston both personally examined Carpino and found no significant limitations on his range of motion. Carpino also points out that the physical therapist found that he demonstrated an ability to perform only 69.3% of the physical demands of a firefighter. However, that physical therapist observed that "Carpino is capable of functioning at greater functional abilities than demonstrated."

¶ 19 Carpino compares this case to *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485 (2007). In that case, Wade, a police officer, sought disability benefits. Two of the three independent doctors who evaluated Wade found him disabled, but the third doctor, Dr. Milgram, disagreed. The board relied on Dr. Milgram's opinion when it denied the application for disability benefits. *Wade*, 226 Ill. 2d at 501. Our supreme court found that Dr. Milgram misstated the evidence in several significant respects. First, Dr. Milgram said that Wade did not tell his treating physician about his injury, but the medical records showed that Wade described his injury to his treating physician promptly. Dr. Milgram also said that the treating physician found only a degenerative tear, not a traumatic injury, but the medical record showed that the treating physician found a traumatic injury. The *Wade* court held that the board's finding, based on Dr. Milgram's opinion, was contrary to the manifest weight of the evidence because Dr. Milgram's "conclusions were inconsistent with the facts available to him." *Wade*, 226 Ill. 2d at 507. Here, we find no misstatements of the evidence in the reports of Dr. Lami and Dr. Huddleston. *Wade* does not support reversal here.

¶ 20 Carpino argues that neither Dr. Lami nor Dr. Huddleston directly stated that he could perform "prolonged and arduous work under adverse conditions," as required by his job description. But Carpino presented no evidence to show that Dr. Lami and Dr. Huddleston did not know the job description or all relevant job requirements when they opined that Carpino could perform all duties of a firefighter. Dr. Skaletsky found that Carpino had a limited range of motion, and that finding formed the basis for his opinion that Carpino could not perform prolonged and arduous work. But Dr. Lami and Dr. Huddleston personally examined Carpino and found no significant limitation on his range of motion. Carpino did

not meet his burden of proving that the Pension Board erred when it relied on the opinions of Dr. Lami and Dr. Huddleston concerning Carpino's ability to work as a firefighter. See *Lambert*, 2013 IL App (2d) 110824, ¶ 23.

¶ 21

CONCLUSION

¶ 22

In this case, because the Pension Board's finding that Carpino could perform his job duties as a firefighter is not contrary to the manifest weight of the evidence, we affirm the Pension Board's denial of Carpino's application for benefits.

¶ 23

Affirmed.