

No. 1-14-3208

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 JUDICIAL DISTRICT

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|---------------------------------------|---|-------------------------|
| JOSEPH TAVITAS, |) | Appeal from the Circuit |
| |) | Court of Cook County. |
| Plaintiff-Appellant, |) | |
| |) | |
| v. |) | Nos. 11 CH 37853 and |
| |) | 14 CH 06557 (cons.) |
| THE RETIREMENT BOARD OF THE FIREMEN'S |) | |
| ANNUITY AND BENEFIT FUND OF CHICAGO, |) | Honorable |
| |) | Thomas Allen, |
| Defendant-Appellee. |) | Judge Presiding. |

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 **Held:** This case involves whether a paramedic firefighter was entitled to an act-of-duty disability pension. We reverse the pension board's decision denying the pension, and reverse the judgment of the circuit court of Cook County affirming the board's denial. The paramedic firefighter established that he is disabled and that his disability occurred in the performance of an act of duty under section 6-151 of the Illinois Pension Code (40 ILCS 5/6-151 (West 2010)). The decision that he was not entitled to pension benefits was clearly erroneous.

¶ 2 This case comes before us for a second time to review whether defendant Retirement Board (Board) of the Firemen's Annuity and Benefit Fund of Chicago (FABF) properly denied

the plaintiff Joseph Tavitas's application for an act-of-duty disability benefit, which he had filed under section 6-151 of the Illinois Pension Code (Pension Code) (40 ILCS 5/6-151 (West 2010)). On our initial review, we did not reach the merits of the underlying claim because the Board never took valid final action on the application. *Tavitas v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 2014 IL App (1st) 132118-U. We vacated the Board's decision and remanded the case with instructions for the Board to take valid final action by conducting a proper affirmative vote on a specific written decision. After the Board did so, and again denied Tavitas an act-of-duty disability benefit, Tavitas filed a second complaint for administrative review. The circuit court affirmed the Board's administrative decision. We reverse both the Board's decision and the circuit court's judgment affirming the Board.

¶ 3

BACKGROUND

¶ 4 The underlying facts are largely uncontested and are set forth in the administrative record. Tavitas was a city employee since 1982 and was assigned to the Chicago Fire Department (CFD) as a paramedic within the bureau of emergency medical services. Tavitas held the rank of ambulance commander and was assigned to ambulance 43.

¶ 5 On May 2, 2010, the CFD dispatched ambulance 43 on a medical emergency call to a senior citizen facility located at 2640 North Sheffield Avenue. Upon arrival, Tavitas and his assigned partner, paramedic Barbara Enos, discovered an elderly man weighing approximately 500 pounds apparently suffering from congestive heart failure. Because of the patient's size, a team of firefighters from a local company assisted Tavitas to move the patient from a wheelchair to a stretcher. Tavitas and the firefighters then rolled the stretcher from the sidewalk to the back door of the ambulance so that they could lift the patient from the stretcher into the treatment compartment. For safety reasons, Tavitas directed five of the firefighters to participate in a six-

person lift to place the stretcher into the ambulance. Tavitias took his place at the foot of the stretcher so that he would be ready to engage a lever to straighten the collapsed wheels once the team lifted the stretcher to the floor level of the treatment compartment. Instead of lifting the stretcher on the count of three, as Tavitias had expected, the firefighters began lifting on the count of two, causing the stretcher to become unbalanced. At the same time, one of the firefighters to the left of Tavitias let go of the stretcher, causing it to tilt toward him. Tavitias bore the weight of the unbalanced stretcher, causing him to suffer pains in his lower back, left knee, and groin. Tavitias testified that he injured his knee again when, moments later, he bent to buckle the patient to the stretcher.

¶ 6 Tavitias testified that, because of the urgent need to transport the patient to a hospital, he did not immediately notify his partner that the lift injured him. Only after the team transferred the patient to Illinois Masonic Hospital did Tavitias tell Enos that he injured his lower back and left knee. Tavitias explained that he was in denial about sustaining the injuries. He preferred to be treated at Northwestern Memorial Hospital (Northwestern) and with the CFD's approval, Enos transported Tavitias to Northwestern.

¶ 7 Dr. David Salzman, an emergency room physician at Northwestern, treated Tavitias. In his written report, Dr. Salzman described Tavitias as follows:

“51 yr old paramedic was lifting an obese patient (described as 500 pounds) into the ambulance. During the lifting process developed pain located on the left lower part of his body, starts in his back radiates around and down to his leg. States is similar in character to prior sciatica that he has from L3, L4, L5 herniated discs. Described as numbness pain also radiates to his groin. a/w pain

in left knee notes that he has a meniscal injury to that knee as well. No abdominal pain, no chest pain, no trouble breathing.”

Dr. Salzman diagnosed Tavitas with lumbago (low back pain), radiculopathy, and groin strain. Differential diagnoses included herniated disc, inguinal hernia, muscle strain, meniscal injury, and stone with radiation to groin.

¶ 8 A triage nurse who treated Tavitas reported that he complained of mild to right sided back pain, left groin/testicle pain, and left knee pain after lifting a heavy patient into an ambulance. As to past medical history, Tavitas stated he had herniated discs at L3, L4, and L5 of his lumbar spine. He also stated that he previously had torn his meniscus and left anterior cruciate ligament (ACL). The nursing narrative assessment states that Tavitas reported a history of meniscal tear and stated, “it feels the same as before.”

¶ 9 A May 2, 2010 CFD report of injury signed by field officer Richard Dorsch stated that the injury occurred when Tavitas was lifting an obese patient (450 pounds) lying on a stretcher into the ambulance. The report stated that Tavitas injured his back, groin, and left knee.

¶ 10 Tavitas received medical treatment over the course of a year until May 2, 2011, his last day on the CFD payroll. During that time, Dr. Frank Phillips evaluated his lower back problems. On May 13, 2010, Dr. Phillips reported that Tavitas is a “51 year old gentleman who injured himself on May 2, 2010. He is an ambulance driver and was lifting a 500 pound person with the assistance of another individual. He shifted and felt pain in his back and left knee.” Dr. Phillips’s written report stated that that Tavitas’s back pain was constant and that he had a history of lumbar disc herniation from 1999 after an injury. Dr. Phillips stated that Tavitas presented “with what appears to be a lumbar sprain/strain.” He recommended that Tavitas undergo conservative treatment with a course of anti-inflammatory medication and six weeks of

physical therapy. Dr. Phillips anticipated that the lower back problems would resolve over that period and further recommended that Tavitas not work.

¶ 11 Tavitas returned to Dr. Phillips on June 24, 2010 having completed six weeks of lumbar therapy. Tavitas stated that he had about a 50% improvement in his back pain. He had no radiating pain or neurological symptoms, but ongoing mild back pain. Tavitas was mostly troubled by the pain in his left knee and wore a knee brace. Dr. Phillips's examination revealed that Tavitas had a normal spinal alignment without any deformity. Given his improvement, Dr. Phillips recommended an additional month of therapy to work on strengthening and stabilization as well as a work conditioning type of program. Dr. Phillips anticipated that after the additional month of therapy, Tavitas would be able to resume regular duty at maximum medical improvement (MMI). He gave Tavitas a 25 pound lifting restriction. The left knee pain limited his ability to complete the lumbar rehabilitation. Dr. Phillips referred Tavitas to Dr. Gregory Nicholson for the left knee issue.

¶ 12 On June 30, 2010, Dr. Nicholson evaluated Tavitas's left knee, noting a history of problems, but stating that he had not reinjured the knee for an extended period of time. Dr. Nicholson reported that after lifting an approximately 500 pound patient, Tavitas "had pain in the left testicular area and the left knee area." His other issues had resolved but he was wearing a knee brace, having pain, and actually limping. Tavitas had no locking, popping, or giving way, but he had some swelling. On physical exam, Dr. Nicholson noted no evidence of effusion. Tavitas had distinct tenderness to palpation over the origin of the medial collateral ligament, distinct tenderness over the posterior medial joint line, a positive Apley's grind test and McMurray's test, and positive pinch test of the patellofemoral joint. Dr. Nicholson stated that "[a]t this point [in] his history, his mechanism of injury and his clinical evaluation is consistent

with a medial meniscus tear.” Dr. Nicholson recommended a magnetic resonance imaging (MRI) of the left knee to rule out the medial meniscus tear. Dr. Nicholson reported that Tavitas was off work and any treatment decisions would be based on the MRI results.

¶ 13 Tavitas underwent an MRI of the left knee on July 12, 2010, which was compared with a February 17, 2005 MRI. Dr. Ryan Braun assessed that the ACL could not be identified due to a previous off-duty injury in 2003 that resulted in the tearing of the ACL. Dr. Braun found that all the other knee ligaments were intact and that Tavitas did not tear his meniscus. According to Dr. Braun, the findings of the MRI related to chronic injury.

¶ 14 On July 28, 2010, Tavitas visited Dr. Nicholson to follow up after the MRI. Dr. Nicholson described Tavitas in his report as a “51-year-old male with some knee pain, which [was] exacerbated by lifting a 500-pound patient onto a gurney.” Tavitas told Dr. Nicholson that the knee pain did not improve. Dr. Nicholson reviewed the MRI of the knee, which demonstrated some medial compartment degenerative joint disease (DJD). Dr. Nicholson assessed Tavitas with “acute knee pain, exacerbation of medial compartment DJD with some complex meniscal tears of the posterior horn.” Dr. Nicholson injected cortisone into the left knee and advised Tavitas to continue icing and take anti-inflammatory medication. Dr. Nicholson continued to recommended that Tavitas not work and to follow up in four weeks for an evaluation.

¶ 15 Tavitas underwent a lumbar MRI on September 1, 2010, which showed normal anatomic alignment of the vertebrae. Dr. Mehmet Kocak reported degenerative disc changes with disc desiccation and height loss at L3-4 through L5-S1.

¶ 16 Tavitas continued to see Dr. Nicholson regarding his left knee. Dr. Nicholson reported that Tavitas had a dramatic decrease in symptoms due to the cortisone injection. He did not have

any difficulty going up and down stairs, but still had pain in the knee and a lack of confidence with regard to any type of lifting or doing any aggressive activity. Dr. Nicholson diagnosed Tavitas with medial compartment osteoarthritis on October 6, 2011. He told Tavitas that his knee was vulnerable. Although Tavitas requested a second cortisone injection, Dr. Nicholson did not recommend injecting the knee again because there was no obvious swelling and knee pain was at baseline. Dr. Nicholson recommended a functional capacity evaluation (FCE) following further resolution of the lower back issue to determine whether Tavitas was physically capable of returning to his job as a paramedic firefighter. He recommended that Tavitas not work due to his knee.

¶ 17 Tavitas also continued to see Dr. Phillips for his lower back pain. On September 16, 2010, Dr. Phillips reviewed the lumbar MRI and found disc space collapse with disc desiccation at L3-4, L4-5, and L5-S1. Dr. Phillips diagnosed mild 3 level disc degenerative changes with L4-5 prolapse. Tavitas's complaints were primarily those of axial pain. Given those findings, Dr. Phillips did not believe he was a candidate for surgery. He recommended a four to six-week lumbar McKenzie therapy program. Dr. Phillips also considered epidural steroid injections. When Tavitas returned to Dr. Phillips in December, he had no considerable improvement. Dr. Phillips reported that Tavitas was not functional and that he had severe axial back pain unresponsive to therapy. Dr. Phillips recommended a trial of epidural steroid shots over six weeks. If Tavitas failed to respond to this treatment, Dr. Phillips stated that he would have reached his MMI from conservative treatment. He would then recommend surgical repair. If Tavitas declined surgery, he would be placed at MMI with an FCE to determine his functional level.

¶ 18 Dr. Daniel Deziel performed an independent medical exam (IME) of Tavitas's groin hernia. Dr. Deziel diagnosed a small left inguinal hernia and recommended surgical repair. Dr. Dina Elaraj performed the surgical procedure on March 25, 2011. Tavitas visited Dr. Elaraj for follow up on April 5, 2011. She restricted him from lifting anything greater than 5 pounds until May 16 and that he would be released following that date without further restrictions. Dr. Elaraj expected recovery to take approximately one year.

¶ 19 On April 12, 2011, Tavitas returned to Dr. Phillips for further evaluation of his lower back. Dr. Phillips reported that Tavitas had no substantial improvement in his axial back pain after undergoing physical therapy and epidural injections. He had been unable to return to work due to the pain. Tavitas did not want to undergo lumbar fusion surgery and Dr. Phillips did not recommend this surgery. Dr. Phillips assessed that Tavitas "has severe persistent low back pain, probably discongenic in origin." He did not respond to an appropriate conservative course of treatment and was at MMI. Dr. Phillips recommended an FCE to gauge Tavitas's physical limitations. According to Dr. Phillips, Tavitas "from a spine point of view" "could work with a 15 pound lifting restriction avoiding repetitive bending."

¶ 20 Tavitas returned to Dr. Nicholson on April 13, 2011. Dr. Nicholson injected cortisone into Tavitas's left knee and recommended an FCE in May to determine permanent restrictions regarding the knee. Dr. Nicholson recommended keeping Tavitas on a work restriction prohibiting him from climbing up and down ladders or stairs, stooping, or squatting.

¶ 21 On April 25, 2011, Tavitas applied for a duty disability benefit pursuant to section 6-151 of the Pension Code (40 ILCS 5/6-151 (West 2010)). The application requested a written explanation regarding the probable cause of the disability, which Tavitas stated as follows:

“While working on [Ambulance] 43 with E-55 as the [Ambulance] Assist Company I injured my back lifting the stretcher when a member of E-55 either detailed or 1st day assignment and unknown to me, he let go of the stretcher while attempting a 6 man lift. The weight transfered [sic] towards me and I felt my back pain. I also injured my left knee, and a left inguinal hernia. This was further aggravated [sic] while moving the stretcher in the Ambulance because the man was so large that the straps would not fit around him and fell blocking the stretcher bar from locking in place. I did not realize the seriousness of my injury initially and the pain progressed and continued while treating the Patient and continues to this day.”

¶ 22 On May 11, 2011, Shauna O’Dowd, a registered nurse and case manager with Managed Care Consultants, Inc., prepared a medical file review for FABF staff which detailed Tavitas’s injuries prior to the May 2, 2010 incident. The report stated that Tavitas suffered an off-duty injury on January 21, 2003, which resulted in a diagnosis of left knee contusion and an ACL tear. He underwent conservative treatment and returned to full duty on April 24, 2003. He sprained his left knee on January 29, 2005 while on duty, underwent conservative treatment, and returned to full duty on May 16, 2005. From June 7, 2005 to June 9, 2005, he again did not work due to a sprained knee related to the January 29, 2005 injury. Tavitas injured his knee again in September 2005 due to an off-duty motor vehicle accident. He returned to full duty on November 4, 2005. On November 2, 1999, he suffered a back injury while on duty. He underwent physical therapy and returned to work on October 16, 2001. On July 21, 2003, Tavitas injured himself while on duty, suffering a lumbar strain and left shoulder strain. He underwent conservative treatment and returned to full duty on September 15, 2003. On

September 13, 2008, Tavitas suffered a duty injury resulting in a diagnosis of lumbar sprain and lumbar spondylosis. He returned to duty on February 13, 2009.

¶ 23 On May 13, 2011, CFD medical director Dr. Hugh Russell sent a written report to Dr. George Motto, the FABF's physician-consultant. According to Dr. Russell, Tavitas's "[d]iagnostic studies demonstrated mild disc degenerative disease at L4-5 and L5-S with bilateral foraminal stenosis, left greater than right, without central stenosis." These were treated with epidural steroid injections and physical therapy. Tavitas's response to conservative treatment was minimal. Dr. Russell also summarized Dr. Nicholson's and Dr. Phillips's diagnoses and treatment. Dr. Russell reported that Tavitas has remained off work and had exhausted all his sick and injury leave.

¶ 24 On May 17, 2011, Dr. Motto examined Tavitas and prepared a pension board physician's report. Tavitas told Dr. Motto that he could not perform his job as a paramedic firefighter without difficulty. During the examination, Tavitas was alert and cooperative. He appeared overweight and had difficulty ambulating, sitting in a chair, and getting up from a chair. Range of motion in his back was good, but limited. Dr. Motto reported that Tavitas could not squat with any facility. He had multiple diagnoses from Drs. Phillips and Nicholson, including degenerative changes with axial and then latter somewhat radicular pain in his back, left knee pain which was nonsurgical, and a recent hernia repair. Dr. Motto noted an upcoming FCE on May 26, 2011, which he would review and would determine, to a degree, further evaluation. Dr. Motto's written report included no opinion regarding the probable cause of Tavitas's injuries.

¶ 25 On June 10, 2011, Tavitas completed an FCE at Accelerated Rehabilitation Center. Phil Rios, an occupational therapist, administrated the FCE and prepared a report, which described Tavitas as a 52-year-old paramedic who reportedly sustained a work-related injury to his back,

abdomen, and left knee on May 2, 2010 as a result of lifting a heavy person on a stretcher. Rios described the therapy and treatment Tavitas received for his back, knee, and hernia. Rios determined his feasibility to return to work as a paramedic firefighter for the CFD and the physical barriers that might prevent him from returning to work. In the evaluation results Rios stated that “[t]he client demonstrates questionable reliability.” Reliability was based on the correlation between subjective complaints and functional performance; presence of exertion, postural changes, and recruitment of muscles. Self-termination of tolerances or refusal to attempt tasks without clinical objective findings signified Tavitas’s inconsistent reliability. Nevertheless, according to Rios, “[t]he overall results of this evaluation do represent a true and accurate representation of [Tavitas’s] overall physical capabilities and tolerances at this time.”

¶ 26 Rios concluded that Tavitas “demonstrates the physical capabilities and tolerances to function at the Medium Category of work, which is indicative of an occasional 2-hand occasional lift of 50 [pounds] from floor-waist level.” Tavitas did not demonstrate the physical capabilities and tolerances to meet all the essential physical demands of the job. As to consistency and validity, Rios stated that Tavitas appeared to be putting forth maximum effort as substantiated by 17 objective tests for validity in 5 major categories. He passed 16 of the 17 objective validity criteria, indicating the test results were valid. Rios repeated at the end of the report that Tavitas displayed questionable consistency in reliability between subjective complaints, the musculoskeletal evaluation, and functional performance.

¶ 27 On July 5, 2011, Tavitas returned to Dr. Phillips with ongoing back pain. In a letter of the same date addressed to Christine Eckstrom of Coventry Health, Dr. Phillips stated that the overall results of the FCE “are felt to be valid.” Dr. Phillips noted the FCE raised a question regarding Tavitas’s reliability. According to Dr. Phillips, Tavitas reached MMI. Dr. Phillips

concluded, “I would concur with the FCE and allow him to work at the medium level. This is likely to be in effect as a permanent restriction.”

¶ 28 Dr. Nicholson also reported the FCE results to Eckstrom on July 6, 2011. He stated that the FCE demonstrated Tavitas could function at a medium category of work, noting that his job as a paramedic and firefighter required a very heavy category of work due to the fact he has to lift over 100 pounds from floor to waist, 100 push/pull over a 75 pound distance, and frequent standing, walking, reaching, stopping, crawling, and stair climbing. Dr. Nicholson concluded that, “[a]t this time, [Tavitas] is unable to do the duties of a fireman or a paramedic. This is a permanent issue with regard to the left knee. He is at maximum medical improvement from the left knee. He has a medial compartment arthritic issue.”

¶ 29 The Board appointed Dr. Christos Giannoulis to conduct an IME of Tavitas. In a written report dated July 28, 2011, Dr. Giannoulis discussed Tavitas’s previous injuries, including in 1977 when he had a tibial nail placed in his tibia due to a fracture. No surgical treatment was performed for the previous ACL and meniscal injuries. Dr. Giannoulis reviewed all of Tavitas’s medical records since the May 2, 2010 injury. He also reviewed the FCE. Dr. Giannoulis noted that the overall results of the FCE were valid and that physical capabilities limited Tavitas to a medium category of work and that Tavitas did not demonstrate the physical capabilities and tolerances to perform the job function of a paramedic firefighter.

¶ 30 Dr. Giannoulis rendered several opinions, all to a reasonable degree of medical certainty: (1) Tavitas had left knee osteoarthritis as well as chronic ACL tear. The osteoarthritis hindered his physical abilities and the FCE indicated that Tavitas put forth his maximal effort for the testing and he was unable to perform the duties of a paramedic firefighter. (2) The objective evidence supporting the diagnosis was Tavitas’s medial and lateral joint line pain. Tavitas had a

positive Lachman test and positive crepitation. “These are all objective tests for osteoarthritis and chronic ACL injury. In addition, he had weight-bearing x-rays that revealed medial compartment narrowing as well as an MRI that confirms an ACL rupture.” (3) Tavitas’s condition of osteoarthritis and chronic ACL injury prevented him from doing his full unrestricted work as a paramedic with the CFD. (4) Tavitas was a candidate for total knee replacement, which would allow him to return back to performing his duties as a paramedic following treatment and healing.

¶ 31 The FABF asked Dr. Giannoulas if he found that Tavitas was unable to perform whether there was “anything about his current condition or medical history that can lead you to conclude that the condition in his left knee resulted from something other than his act of duty incident” which occurred on May 2, 2010. Dr. Giannoulas responded that Tavitas had preexisting osteoarthritis in his left knee and preexisting ACL and meniscal injuries. “His accident was not directly related to his osteoarthritis, but is an aggravating factor. This aggravating factor is permanent at this time.”

¶ 32 On August 24, 2011, Tavitas testified before the Board at his hearing for application for a duty disability benefit. Under questioning from the Board’s attorney, Tavitas described the incident in question:

“[T]he injuries were sustained while lifting a large approximately 500 pound man in which I was -- I had grasped the lever end of the stretcher which is at the end. And I asked all the firefighters to do a six man lift so no one would get hurt. And I counted one two. Everyone started to lift on two before I even got to three. And I had -- the remaining part of the stretcher all around me was higher and I had to pull the lever up, the lever end, in order to click it [so] it would fit into the

ambulance. On the way up the firefighter in the center had let go of the stretcher and ran around to the back and that is when I sustained my injuries.”

¶ 33 Tavitas stated that he injured his back and knee, and that he sustained a hernia. He acknowledged that he did not report the injury immediately after it happened. He explained that his concern was to deliver the patient to the hospital. Tavitas also stated that as he moved the stretcher, he felt something in his knee when he got into the ambulance and that was when he realized he had been injured. He further explained, “I focused on the patient. And it wasn’t until I got into the emergency room that I realized that this was not something that I could work [past] any of the injuries. And I let my partner know. By that point in time I think the engine had left the scene already.” After bringing the patient to Illinois Masonic Hospital, Tavitas went to Northwestern for treatment.

¶ 34 Tavitas testified regarding his prior back and knee injuries. He read the report of the FCE. Regarding the section of the FCE questioning his reliability, Tavitas explained that he reinjured himself while completing the FCE and that he “was in a lot of pain throughout this testing procedure but I continued and I overrode the pain and performed as best as I could until I couldn’t take the pain anymore.”

¶ 35 Dr. Motto testified regarding his review of Dr. Giannoulis’s IME. The following colloquy occurred between the Board’s counsel and Dr. Motto:

“Q. Alright. Did Doctor Giannoulis attribute the condition of his knee, current condition, to the exacerbation of a prior --

A. Yes. He said that the current incident did not cause the underlying degenerative process or the ACL process, but that the current situation exacerbated the pain -- the problem with the knee.

Q. Is it possible to have a preexisting arthritic condition in the knee that was just a result of natural aging that could have been aggravated?

A. I would say the ACL would be hard to duplicate through the aging process.

Certainly the other problems, yes.”

Dr. Motto testified that, in his opinion, Tavitas could not perform the duties of a paramedic firefighter.

¶ 36 Members of the Board continued to question Dr. Motto regarding Tavitas’s prior injuries. Dr. Motto testified that it was remarkable that Tavitas functioned for years following an unrepaired ACL tear. Tavitas told the Board that there were a number of injuries that he never reported and that he continued to work for years while in pain. Board member Anthony Martin responded, “I have known only one person in the nine years that I have been up here that had more.”

¶ 37 After testimony concluded that day, the Board adopted a motion to recess into closed session without stating an applicable statutory reason.¹ Upon reconvening, the Board recessed the hearing to accommodate an absent witness. The Board reconvened about a month later, on September 21, 2011, and heard the testimony of Enos, who had assisted with the May 2, 2010 ambulance call. She testified that Tavitas reported his injury to her after caring for the patient transferred to Illinois Masonic. After Enos testified, board member Martin moved to grant Tavitas’s application. The motion was seconded, but the motion lost on a 3 to 4 vote. According to the transcript, immediately after the last member voted, the chairman announced: “Based on

¹ As we noted in *Howe v. Retirement Board of Firemen’s Annuity & Benefit Fund of Chicago*, 2013 IL App (1st) 122446, ¶ 13, n.1, section 2(a) of the Open Meetings Act (5 ILCS 120/2(a) (West 2010)) required the motion to state the specific statutory exemption under which the Board could meet in closed session. Again, we do not find this apparent violation to be material to our disposition of the precise issues before us. See *id.*

the Findings of Fact made by the Trustees, the Trustees have voted to deny you the benefit you have requested. You will be notified by mail of the Findings of Fact and the Board's decision. Okay, good luck to you."

¶ 38 The Board issued a written decision, dated the same day as the second hearing, September 21, 2011, but which was prepared and issued some time later. The decision was signed only by the four Board members who voted against the motion to grant the application. The written decision stated that Tavitas "did not present sufficient evidence to meet his burden of proof to show that he is entitled to receive a Duty Disability Benefit pursuant to 40 ILCS 5/6-151 of the Pension Code [sic]." The Board transmitted the decision to Tavitas on September 28, 2011, along with a cover letter stating that the Board had met on September 21, 2011. The Board's cover letter stated that Tavitas would have 35 days from the date of mailing (September 28) to file a complaint for administrative review.

¶ 39 On November 1, 2011, Tavitas filed his complaint for administrative review in the circuit court. On June 6, 2013, the circuit court issued a summary order affirming the Board's decision on the merits. Tavitas appealed to this court and we declined to reach the merits for several reasons. First, the Board's resolution of the case on a majority "no" vote violated the common law principle that a collective body cannot take action by voting against a motion. Second, we found that the board never actually voted on the written decision, which had been prepared after-the-fact. See *Tavitas*, 2014 IL App (1st) 132118-U, ¶ 14; *Howe*, 2013 IL App (1st) 122446, ¶ 21. We reversed the circuit court's judgment affirming the decision of the Board, vacated the Board's decision to deny Tavitas his application for a duty disability benefit, and instructed the Board to render a valid final action in this cause. *Tavitas*, 2014 IL App (1st) 132118-U, ¶¶ 14, 16.

¶ 40 On March 19, 2014, the Board met again and resolved the application through a proper affirmative majority vote on a specific written decision. The Board found that Tavitas did not present sufficient evidence to meet his burden of proof to show that he was entitled to receive a duty disability benefit pursuant to section 6-151 (40 ILCS 5/6-151 (West 2010)) of the Pension Code. In its written decision, the Board made several findings of fact, including:

“3. The applicant testified that on May 2, 2010, he was engaged in an act of duty as defined by 40 ILCS 5/6-110 when he sustained injuries to his lower back, groin and left knee.

4. The applicant did not immediately state that he was injured at the time the incident occurred on May 2, 2010.

5. The applicant underwent surgery on his left inguinal hernia on March 25, 2011, and has been released without restrictions.

6. The applicant has undergone several epidural steroid injections and physical therapy for his lower back without relief of his axial back pain symptoms.

7. The applicant has been diagnosed with osteoarthritis in his left knee and has had injections to treat the recurrent pain.

8. An MRI on September 1, 2010, showed degenerative disc and facet changes at L3-L4 through L5-S1 with some mild narrowing of the spinal canal.

9. The applicant had a Functional Capacity Evaluation (“FCE”) on June 10, 2011, which showed that he could only meet the “Medium” work level category.

10. The administrator of the FCE reported that the applicant displayed questionable consistency and reliability and that his subjective complaints of pain were not consistent with his functional performance.

11. The applicant's treating physician, Gregory Nicholson, M.D. and the Retirement Board's physician-consultant, George S. Motto, M.D., have concluded that the applicant has not made a full recovery from the injury to his left knee.

12. The applicant was also examined by Christos S. Giannoulas, M.D., at the direction of the Board. Dr. Giannoulas found arthritis and an ACL tear that pre-existed May 2, 2010."

The written decision included the signatures of the three Board members who voted in the affirmative to deny Tavitas's request for duty disability benefits.

¶ 41 Tavitas then filed a second complaint for administrative review in the circuit court. He alleged that the Board's findings were against the manifest weight of the evidence and contrary to law.

¶ 42 On October 15, 2014, the circuit court affirmed the Board and "dismissed" the complaint for administrative review with prejudice.² This appeal followed.

¶ 43 ANALYSIS

¶ 44 Tavitas argues that he satisfied his burden of proof for a duty disability benefit under section 6-151 of the Pension Code (40 ILCS 5/6-151 (West 2010)). He asserts that the medical evidence presented to the Board established that he is disabled under the meaning of section 6-151. According to Tavitas, duty injuries that aggravated preexisting conditions and cumulative injuries resulting from acts of duty have rendered him disabled.

² A section of the Administrative Review Law specifies the proper final dispositions for courts hearing administrative review cases on the merits. Under that law, the circuit court can, among other things, affirm or reverse the decision of the Board in whole or in part. Therefore, it is technically improper for a reviewing court to "dismiss" an administrative review complaint, either with or without prejudice, when it finds the decision was correct. 735 ILCS 5/3-111(a)(5) (West 2010).

¶ 45

Standard of Review

¶ 46 Tavitas acknowledges that, generally, the manifest weight of the evidence standard applies to the Board's findings of fact. However, Tavitas argues that the Board's determination in this case involved a mixed question of law and fact, in which a clearly erroneous standard of review applies.

¶ 47 The Administrative Review Law (5 ILCS 5/3-101 *et seq.* (West 2010)) governs our review of the Board's decision. "The scope of our review extends to all questions of law and fact presented by the record." *Village of Broadview v. Illinois Labor Relations Board*, 402 Ill. App. 3d 503, 505 (2010) (citing 735 ILCS 5/3-110 (West 2008)). "The applicable standard of review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law." *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board State Panel*, 216 Ill. 2d 569, 577 (2005).

¶ 48 The Board's findings of fact are "held to be prima facie true and correct" (735 ILCS 5/3-110 (West 2010)) "and will be disturbed on review only if they are against the manifest weight of the evidence." *Village of Broadview*, 402 Ill. App. 3d at 505 (citing *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998)). The Board's findings of fact are against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008) (citing *City of Belvidere*, 181 Ill. 2d at 204).

¶ 49 We review the Board's conclusions of law *de novo*. *Cinkus*, 228 Ill. 2d at 211. An agency's decision on a question of law is not binding on us, so our review is independent and not deferential. *Id.* at 210.

¶ 50 Cases that involve mixed questions of law and fact are subject to a clearly erroneous standard of review. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 392 (2001). A mixed question of law and fact typically arises when “the historical facts are not in dispute and the issue is whether the established facts satisfy the statutory standard.” *Village of Hazel Crest v. Illinois Labor Relations Board*, 385 Ill. App. 3d 109, 113 (2008). An agency’s decision is clearly erroneous “only where the reviewing court, on the entire record, is ‘left with the definite and firm conviction that a mistake has been committed.’ ” *AFM Messenger*, 198 Ill. 2d at 395 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

¶ 51 The facts in the record are basically undisputed. The parties dispute, however, whether the established facts satisfy the statutory standard in the Pension Code. Accordingly, we review the Board’s decision under a clearly erroneous standard of review. *AFM Messenger*, 198 Ill. 2d at 392, 395; *Village of Hazel Crest*, 385 Ill. App. 3d at 113; see also *Rokosik v. Retirement Board of the Firemen’s Annuity & Benefit Fund*, 374 Ill. App. 3d 158, 166 (2007) (applying clearly erroneous standard). The Pension Code must be liberally construed in favor of the rights of the applicant. *Johnson v. Retirement Board of the Policemen’s Annuity & Benefit Fund*, 114 Ill. 2d 518, 521 (1986). We review the decision of the Board and not the circuit court. *Village Discount Outlet v. Department of Employment Security*, 384 Ill.App.3d 522, 524-25 (2008)

¶ 52 Whether Tavitas Satisfied His Burden of Proof Under the Pension Code

¶ 53 Under section 6-151 of the Pension Code (40 ILCS 5/6-151 (West 2010)), “[i]t is the applicant’s burden to establish both that he is disabled and that his disability is the result of an injury incurred in the performance of an act of duty.” *Terrano v. Retirement Board of Policemen’s Annuity & Benefit Fund of Chicago*, 315 Ill. App. 3d 270, 274 (2000); see also

Marconi v. Chicago Heights Police Pension Board, 225 Ill. 2d 497, 532 (2006) (finding a plaintiff in an administrative proceeding bears the burden of proof, and if he fails to meet that burden, relief will be denied). Section 6-151 of the Pension Code provides in pertinent part:

“An active fireman who is or becomes disabled on or after the effective date as the result of a specific injury, or of cumulative injuries, or of specific sickness incurred in or resulting from an act or acts of duty, shall have the right to receive duty disability benefit during any period of such disability for which he does not receive or have a right to receive salary, equal to 75% of his salary at the time the disability is allowed.” 40 ILCS 5/6-151 (West 2010).

The Pension Code defines an “act of duty” as follows:

“Any act imposed on an active fireman by the ordinances of a city, or by the rules or regulations of its fire department, or any act performed by an active fireman while on duty, having for its direct purpose the saving of the life or property of another person.” 40 ILCS 5/6-110 (West 2010).

The Pension Code defines “disability” as “[a] condition of physical or mental incapacity to perform any assigned duty or duties in the fire service.” 40 ILCS 5/6-112 (West 2010). Section 6-153 of the Pension Code requires that “[p]roof 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.” 40 ILCS 5/6-153 (West 2010).

¶ 54 We first address whether Tavitas satisfied his burden to prove that he is disabled. The medical evidence in the record establishing Tavitas's physical limitations and inability to perform the duties of an active paramedic firefighter, detailed above, is uncontroverted and, therefore, could not have been disregarded by the Board. See *Terrano*, 315 Ill. App. 3d at 275. As Tavitas correctly points out, the Board's findings of fact specifically state that "[t]he applicant's treating physician, Gregory Nicholson, M.D. and the Retirement Board's physician-consultant, George S. Motto, M.D., have concluded that the applicant has not made a full recovery from the injury to his left knee." Accordingly, the evidence supported the Board's findings of fact and Tavitas's claim that he met the initial burden of proof required by sections 6-112 and 6-153 of the Pension Code. *Terrano*, 315 Ill. App. 3d at 276.

¶ 55 The fact that an individual has physical limitations which prevent him from performing the duties of an active paramedic firefighter does not, however, necessarily resolve whether he is disabled within the meaning of section 6-151 of the Pension Code so that he can obtain an act-of-duty pension. The Board justifies its denial on two bases: (1) the FCE questioned Tavitas's credibility; and (2) the evidence demonstrated the injury was not proximately caused by an act of duty. We address these issues in turn.

¶ 56 First, the Board justifies its denial on the basis of witness credibility, asserting "there are credibility issues surrounding Tavitas's complaints of pain and his physical ability as highlighted by the Functional Capacity Evaluation." The Board contends that the report from the FCE (the administrator of which never testified in person) "supports the Board's decision regarding Tavitas's lack of credibility and, in turn, is sufficient to support the Board's decision to deny Tavitas' application for duty disability benefits." The Board found that "[t]he administrator of the FCE reported that the applicant displayed questionable consistency and reliability and that

his subjective complaints of pain were not consistent with his functional performance.” According to the Board, “the unbiased clinical observation of the physical therapist who observed Tavitas during the FCE is entitled to substantial weight.” The Board’s credibility finding is flawed for a number of reasons.

¶ 57 The credibility analysis operates on two levels. Section 6-153 of the Pension Code requires proof of duty disability “by at least one licensed and practicing physician appointed by the Board.” 40 ILCS 5/6-153 (West 2010). Rios, the occupational therapist who administered the FCE and questioned Tavitas’s credibility, is not a licensed or practicing physician at all. Rios, who did not testify, made a credibility determination regarding Tavitas, who did testify. That is questionable enough, but the Board apparently made a credibility determination regarding competing parts of Rios’s report, finding some parts credible and others not. In so doing, the Board fell into a common trap. We often see the problem created when two different persons submit conflicting affidavits and a party (or a court) makes credibility findings based merely on the written documents. Here, the Board committed an aggravated variation on that error by making a credibility determination between two conflicting parts of the same piece of paper. Because the report was only in written form, we stand in the same position as the board regarding its interpretation and meaning, and we consider it *de novo*. *Wade v. City of North Chicago Police Pension Bd.*, 226 Ill. 2d 485, 506 (2007) (holding that when physician’s report was submitted only in writing, “factors such as the demeanor of testifying witnesses” did not “figure into an assessment of credibility.”).

¶ 58 The report must be considered as a whole. Rios concluded in the very same report that “[t]he overall results of this evaluation do represent a true and accurate representation of [Tavitas’] overall physical capabilities and tolerances at this time.” Rios stated that Tavitas

“does not demonstrate the physical capabilities and tolerances to perform all of the essential job functions of a Paramedic.” As to consistency and validity, Rios stated that Tavitias appeared to be putting forth *maximum effort* as substantiated by 17 objective tests for validity in 5 major categories. Rios reported that Tavitias passed *16 of the 17 objective validity criteria*, indicating the test results from the FCE were valid. Tavitias’s treating physicians reviewed the FCE results and both Drs. Phillips and Nicholson concluded that Tavitias was unable to perform the duties of a paramedic firefighter. The Board’s appointed physician, Dr. Giannoulis, reviewed the FCE and specifically stated in his report that the overall results of the FCE were valid. Dr. Giannoulis stated that, in his opinion, the objective evidence supporting his diagnosis was Tavitias’s medical and lateral joint line pain. In Dr. Giannoulis’s opinion, Tavitias’s condition of osteoarthritis and chronic ACL injury prevented him from doing his full unrestricted work as a paramedic with the CFD. Dr. Motto testified that Dr. Giannoulis based his opinion on objective findings. The Board did not ask Dr. Motto any questions regarding Tavitias’s credibility or reliability during the FCE. Tavitias testified that he reinjured himself while trying to complete the FCE, which hampered his ability to perform at the level he believed he was capable of, yet Rios nevertheless concluded Tavitias put forth maximum effort.

¶ 59 Whether viewed in isolation or in light of all the evidence presented, the FCE report provides no support whatsoever for any negative credibility determination regarding Tavitias. Every doctor who examined him, including the Board-appointed physician, reported that he suffered from debilitating pain which prevented his return to full active duty as a paramedic firefighter for the CFD. We find that the Board’s reliance on the FCE report to conclude Tavitias displayed questionable consistency and reliability, thereby supporting its denial of duty disability

benefits, was clearly erroneous. See *Kouzoukas v. Retirement Board of Policemen's Annuity & Benefit Fund of Chicago*, 234 Ill. 2d 446, 468-69 (2009).

¶ 60 We next address the proximate cause issue. The Board states that, although Dr. Motto testified to a reasonable degree of medical certainty that Tavitas could not perform his duties with the fire department, his testimony also indicated he could not point to a specific thing that caused the problem. The Board points to medical evidence of degenerative changes in the lower back and spine that occurred before May 2, 2010. The Board also contends that Tavitas never complained of pain at the time of the injury, which supports the finding that he was not injured during an act of duty.

¶ 61 In Illinois, it is well-established that to obtain a duty disability benefit, “[a] claimant need not prove that a duty-related accident is the sole cause, or even the primary cause, of his disability.” *Luchesi v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 333 Ill. App. 3d 543, 550 (2002) (citing *Barber v. Board of Trustees of the Village of South Barrington Police Pension Fund*, 256 Ill. App. 3d 814, 818 (1993) (“There is no requirement that the duty-related incident be the originating or primary cause of the injury, although a sufficient nexus between the injury and the performance of the duty must exist.”) (abrogated on other grounds by *Kouzoukas*, 234 Ill. 2d at 473-74)). Rather, the claimant only needs to prove “that the duty-related accident is a causative factor contributing to the claimant’s disability.” *Luchesi*, 333 Ill. App. 3d at 550. In particular, a duty disability benefit may be based upon the duty-related aggravation of a claimant’s preexisting physical condition. *Wade*, 226 Ill. 2d at 505; *Carrillo v. Park Ridge Firefighters' Pension Fund*, 2014 IL App (1st) 130656, ¶ 23.

¶ 62 Tavitas had the burden of proof to establish that there was a causal connection between an act of duty and his disability. *Wade*, 226 Ill. 2d at 505; *Marconi*, 225 Ill. 2d at 532-33. The

parties agree, and the medical evidence establishes, that Tavitas had preexisting physical conditions that contributed to his disability. Tavitas suffered a torn ACL, meniscus, and other knee injuries before May 2, 2010, which contributed to the osteoarthritis and medial compartment DJD that Dr. Nicholson diagnosed on July 28, 2010 and October 6, 2011. Dr. Nicholson reported that the knee pain was “exacerbated by lifting a 500-pound patient onto a gurney.” Medical records from before May 2, 2010 also showed that Tavitas had disc degenerative changes in his lumbar spine as early as 1999.

¶ 63 In a form submitted to Dr. Giannoulis for the IME, the FABF specifically asked him if he found that Tavitas was unable to perform his duties as a paramedic firefighter and whether there was “anything about his current condition or medical history that can lead you to conclude that the condition in his left knee resulted from something other than his act of duty incident.” Dr. Giannoulis responded that Tavitas had preexisting osteoarthritis in his left knee and preexisting ACL and meniscal injuries. Dr. Giannoulis stated, “[h]is accident was not directly related to his osteoarthritis, but is an aggravating factor. This aggravating factor is permanent at this time.” Crucially, no other medical evidence or testimony contradicts this finding by Dr. Giannoulis.

¶ 64 The Board claims Dr. Motto testified that Tavitas’s degenerative changes and arthritis could have been caused by aging. This claim is incorrect, because the only questioning in this line of examination was vague and imprecise. The Board’s counsel asked Dr. Motto, “Is it possible to have a preexisting arthritic condition in the knee that was just a result of natural aging that could have been aggravated?” This question was not specifically about Tavitas, but patients in general. Dr. Motto responded, “I would say the ACL would be hard to duplicate through the aging process. Certainly the other problems, yes.” The Board never asked Dr. Motto whether

Tavitas's act of lifting a stretcher with a 500-pound patient aggravated a preexisting injury. Instead, Dr. Motto's testimony confirmed Dr. Giannoulas's finding that the May 2, 2010 incident exacerbated the problem with the knee.

¶ 65 Based on Dr. Giannoulas's uncontroverted finding that the May 2, 2010 incident aggravated Tavitas's preexisting condition, we find Tavitas met his burden of proof to establish a causal connection between an act of duty and his disability. See *Sullivan v. Retirement Board of Firemen's Annuity & Benefit Fund of Chicago*, 267 Ill. App. 3d 965, 972 (1994).

¶ 66 The Board also contends that Tavitas's delay in reporting the injury undermines his credibility and supports its finding that he did not suffer an act-of-duty disability. It argues its finding that Tavitas's ACL tear preexisted the May 2, 2010 incident was supported by the evidence that at the time of injury, he never complained of pain. The Board cites *Demski v. Mundelein Police Pension Board*, 358 Ill. App. 3d 499 (2005) in support of its argument. In *Demski*, however, the plaintiff did not report back pain until two days after she suffered the injury while completing a routine physical agility test. *Demski*, 358 Ill. App. 3d at 500. The plaintiff did not report the injury at the time she first felt pain because she did not want to "come across as a weak officer." *Id.* at 501. The Board found that the plaintiff's disability was not caused by the performance of an act of duty because the testimony did not support a finding that the injury occurred during the physical agility test and that, even if it had occurred at that time, the agility test was not an "act of duty" within the meaning of the Pension Code. The reviewing court affirmed the decision of the Board. *Id.* at 504-05. The court noted preexisting back injuries in 1993 and 1999, and testimony that the plaintiff was observed carrying heavy objects the day following the agility test. The medical evidence also supported the Board's decision. *Id.*

¶ 67 The facts in this case do not resemble those in *Demski*. Tavitias responded while on duty as an ambulance commander to a medical emergency call to assist an approximately 500-pound elderly man suffering from congestive heart failure. Due to the patient's large size, Tavitias instructed a team of five firefighters to help him lift the patient into the ambulance for transport to the hospital. The firefighters began lifting the patient's stretcher before Tavitias was ready and then, during the lift, one of the firefighters let go of the stretcher, causing Tavitias to bear more weight to balance the stretcher while it was loaded into the ambulance. Tavitias testified that this was when he injured his lower back, left knee, and groin. He testified that he injured his knee again when, moments later, he bent to buckle the patient to the stretcher in the ambulance. He did not report the injury immediately out of concern for the patient. The fact that Tavitias did not instantly cry out in pain was reasonable considering that he was in the process of "saving the life *** of another person," as contemplated by section 6-110 of the Pension Code (40 ILCS 5/6-110 (West 2010)). As soon as Tavitias transferred the patient to nearby Illinois Masonic Hospital³, he immediately reported the injury to his partner, paramedic Enos. The causal chain was not broken here even if Tavitias's subsequent injury that he sustained while buckling in the patient further aggravated the preexisting injuries that had been weakened by his paramedic rescue activities. *Devaney v. Board of Trustees of the Calumet City Police Pension Fund*, 398 Ill. App. 3d 1, 12 (2010) ("The law is clear that a subsequent accident that aggravates the condition that was weakened by a work-related accident does not break the causal chain."). The evidence supports the conclusion that Tavitias was injured while acting in his capacity as a paramedic firefighter

³ We take judicial notice that Illinois Masonic Hospital is only one-half mile from the senior citizen building from which the ambulance picked up the patient. *People v. Deleon*, 227 Ill. 2d 322, 326 (2008) (holding an appellate court may take judicial notice of the distances between two locations).

engaged in a function peculiar to firefighters and “having for its direct purpose the saving the life *** of another person.” 40 ILCS 5/6-110 (West 2010).

¶ 68 Because Tavitas sufficiently established that he was injured during an act of duty, we find that the uncontested medical evidence in the record supports Tavitas’s claim that the May 2, 2010 incident aggravated his preexisting knee and back injuries and established a sufficient nexus between the injury and act of duty. Because the evidence of a duty-related aggravation of a preexisting condition was not contradicted and Tavitas satisfied his burden of proof on the issue of proximate cause, we find the Board’s decision to deny his application for a duty disability benefit clearly erroneous. Tavitas qualified for a duty disability benefit under section 6-151 of the Pension Code (40 ILCS 5/6-151 (West 2010)). Accordingly, the circuit court erred in affirming the Board’s decision to deny Tavitas’s application for a duty disability benefit.

¶ 69 CONCLUSION

¶ 70 We reverse the decision of the Board of the Firemen’s Annuity and Benefit Fund of Chicago. We also reverse the judgment of the circuit court affirming the Board’s decision. We remand the cause to the Board with directions to grant Tavitas’s application for a duty disability benefit pursuant to section 6-151 of the Pension Code (40 ILCS 5/6-151 (West 2010)).

¶ 71 Reversed and remanded with directions.