2015 IL App (1st) 150125-U

SIXTH DIVISION
Order filed: December 23, 2015

No. 1-15-0125

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JOHN W. CHWARZYNSKI, Plaintiff-Appellant, v. The RETIREMENT BOARD OF THE FIREMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County No. 09 CH 39466 Honorable Kathleen M. Pantle, Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The decision of the Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago (Board), denying the plaintiff occupational disease disability benefits pursuant to section 6-151.1 of the Illinois Pension Code (Code) is not against the manifest weight of the evidence; and the circuit court did not err in permitting the Board to withdraw its supplemental answer to the plaintiff's complaint and remanding the matter back to the Board for the purpose of allowing it to adopt a written decision that was consistent with its vote denying the plaintiff's application for benefits.

¶ 2 The plaintiff, John W. Chwarznski, appeals from an order of the circuit court which affirmed a decision of the Retirement Board of the Firemen's Annuity and Benefit Fund of

Chicago (Board), denying him occupational disease disability benefits pursuant to section 6-151.1 of the Illinois Pension Code (Code) (40 ILCS 5/6-151.1 (West 2008)) and from an earlier order of the circuit court which permitted the Board to withdraw its supplemental answer to his complaint and remanded the matter back to the Board for the purpose of allowing it to adopt a written decision that was consistent with its vote denying his application for benefits. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The present appeal is the third time that this matter has come before this court. See *Chwarznski v. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago*, 2012 IL App (1st) 103719-U (unpublished order under Supreme Court Rule 23); *Chwarznski v. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago*, 2012 IL App (1st) 111933-U (unpublished order under Supreme Court Rule 23). We will restate those facts adduced from the evidence presented at the Board's hearings on the plaintiff's application for disability benefits which are relevant to our resolution of this appeal.

¶ 4 The plaintiff was appointed a member of the Chicago fire department (Department) in February 1987. He served in that capacity until May 2005 when he became the president of the Chicago Fire Fighters' Union Local No. 2 and did not participate in fire suppression activities after May 2005. The plaintiff testified that, during the time he worked as an active firefighter prior to May 2005, he was exposed to smoke and other contaminants hundreds of times. Upon returning to active service in July 2007, the plaintiff was assigned to the Department's training academy where he worked until November 2007.

¶ 5 On November 8, 2007, the plaintiff complained of tightness in his chest with accompanying difficulty in breathing. He went to the Resurrection Immediate Care Center where he was treated and discharged on that same day. On referral from his personal physician,

Dr. Joseph L. Giacchino, the plaintiff was seen on November 12, 2007, by Dr. Neil Rosenberg, a pulmonologist. During that visit, the plaintiff complained of chest pain, shortness of breath and a cough which he had been experiencing for several months. He denied wheezing or any history of asthma. Dr. Rosenberg's examination of the plaintiff revealed that his blood pressure, respiration and pulse were regular, his nasal mucosa was dry, his pharynx was clear, and his lungs were clear. On orders of Dr. Rosenberg, the claimant underwent a number of scans and tests at Westlake Hospital, including a chest x-ray as well as a CT scan of his chest. The chest x-ray demonstrated that the plaintiff's heart size was within normal limits, his pulmonary vascularity was normal, and his lungs were clear. The CT scan revealed that the plaintiff's lungs were clear, his heart and blood vessels were unremarkable, there were no masses or adenopathy present, and there was no gross abnormality within his adrenal glands. On November 13, the plaintiff underwent stress tests and a cardiac echo Doppler test. In a report of his exercise thallium stress test, Dr. N. Patodia noted that the plaintiff achieved 94% of the age-predicted maximum heart rate, his resting electrocardiogram was unremarkable, and he did not suffer chest discomfort or ST segment displacement while exercising. The report does state that the plaintiff had bouts of coughing while exercising and that the test was terminated due to fatigue. Dr. Patodia concluded that the test was negative for myocardial ischemia. Dr. Robert M. Leibman administered a cardiac stress test which, according to the doctor's report, "did not demonstrate any areas of diminished activity to suggest the presence of ischemic changes." The plaintiff also had a cardiac echo Doppler test which revealed that, except for "trivial pulmonic regurgitation," his heart valves and chambers were normal, as was his cardiac blood flow. Dr. Rosenberg discharged the plaintiff from the hospital on November 13, 2007, with no restrictions and a recommendation that the plaintiff schedule a follow-up appointment.

¶ 6 On November 13, 2007, the plaintiff was placed on the Department's medical rolls for non-duty sickness based upon the recommendation of Dr. Giacchino.

¶ 7 On December 18, 2007, the plaintiff went to Stroger Hospital for a pulmonary function test (PFT). However, the technician administering the test noted unacceptable spirometric results and stopped the test after three attempts due to interference by the plaintiff's coughing. The record reflects that a PFT was once again attempted on January 20, 2008, but again failed to provide acceptable results after four attempts. In a handwritten notation on the report of that test, Dr. Rosenberg wrote "Mod. Ob. Defect," meaning moderate obstruction defect.

¶ 8 In a letter dated February 18, 2008, addressed to Dr. Isaac Morcos, the Department's occupational health physician, Dr. Rosenberg reported that the plaintiff had a "debilitating cough" which he diagnosed as hyperactive airways that was being treated with medication. Dr. Rosenberg also provided a summary of the tests which he had ordered. He wrote that the plaintiff's condition was easily treated with medication, and although his condition was debilitating at that time, Dr. Rosenberg stated that the plaintiff's cough was slowly improving and that the plaintiff should be able to return to his usual duties within four to six weeks.

¶ 9 When the plaintiff was seen by Dr. Rosenberg on February 20, 2008, he reported that his coughing had gotten worse and that he had an episode of cough syncope the day before and was seen at Resurrection Hospital. Dr. Rosenberg's examination of the plaintiff on that date revealed a pulse of 88, respirations of 16, and 96% oxygen saturation. The doctor also noted that the plaintiff's nasal mucosa was dry and his lungs were clear. Dr. Rosenberg's impression as of that visit was that the plaintiff had chronic obstructive pulmonary disease (COPD) with hyper-reactive airways. Dr. Rosenberg ordered a CT scan of the plaintiff's sinuses to rule out sinusitis and silent reflux. That CT scan was performed on February 28, 2008, by Dr. Lieberman. His

report states that the scan revealed that the plaintiff had moderate mucosal thickening in the sinuses. Dr. Lieberman's overall impression from the scan was that the plaintiff had "pans sinusitis with involvement of the ostiomeathal complexes."

¶ 10 The plaintiff was next examined by Dr. Rosenberg on March 5, 2008. As of that examination, the plaintiff's respirations were 16, his oxygen saturation was 97%, and his lungs were clear. Dr. Rosenberg confirmed the diagnosis of pansinusitis and prescribed medication.

¶ 11 On March 31, 2008, the plaintiff underwent a screening of his paranasal sinuses. Dr. Lieberman reported that the results were compatible with a diagnosis of chronic sinusitis.

¶ 12 On April 3, 2008, Dr. Rosenberg reported to the Department that the plaintiff was not capable of returning to full duty due to his COPD and chronic sinusitis with cough syncope.

¶ 13 On May 14, 2008, the plaintiff had a nasal sinus endoscopy which was performed by Dr. James Stankiewicz. In his post-operative report, Dr. Stankiewicz noted that the plaintiff suffered from "chronic sinusitis refractory to medical treatment and allergic rhinitis." He concluded that the plaintiff's cough was "probably not sinus, [l]ung or reflux. Sinusitis may be contributing to lung issues."

¶ 14 The plaintiff next saw Dr. Rosenberg on June 6, 2008. As of that visit, Dr. Rosenberg diagnosed the plaintiff with sinusitis, moderate obstructive defect, chronic cough, and gastroesophageal reflux disease (GERD). On July 21, 2008, Dr. Rosenberg authored another report to the Department in which he stated that the plaintiff was not capable of returning to full active duties due to "obstructive lung disease, sinusitis & other lung problems."

¶ 15 Dr. Rosenberg ordered a PFT which was performed on August 14, 2008, at Weiss Memorial Hospital. Dr. Nelson Kanter's report of that test states that the test was impaired by the plaintiff's persistent cough. The plaintiff's lung diffusing capacity could not be measured due

to his inability to perform a breath holding maneuver. However, the test did reveal that the plaintiff's forced vital capacity was "within normal limits." The report states that the test also revealed a "15% improvement in the FEV1[ ]following albuterol inhalation" which suggested "a pattern of partially reversible airways obstruction."

¶ 16 On September 9, 2008, Dr. Giacchino authored a letter in which he stated that he had been the plaintiff's family physician since 2002 and had treated him for recurrent bouts of respiratory infections and bronchitis. According to the letter, testing of the plaintiff in Dr. Giacchino's office showed a significant decree of COPD and chronic bronchitis. Dr. Giacchino wrote that the plaintiff found himself extremely sensitive to smoke, fumes, and dust while working that exacerbated his breathing condition. In the letter, Dr. Giacchino states that he referred the plaintiff to Dr. Rosenberg and that the pulmonary tests performed by Dr. Rosenberg showed that the plaintiff had a significant degree of asthmatic bronchitis, hyperactive airway disease, and COPD. According to Dr. Giacchino, the plaintiff's condition was easily exacerbated and he should avoid exposure to smoke, fumes and dust, and that in his opinion, the plaintiff was totally disabled from any employment as a firefighter.

¶ 17 On September 11, 2008, Dr. Rosenberg authored a letter, summarizing his treatment of the plaintiff since November 2007, and specifically noting that the plaintiff had shown little improvement despite a "regimen of medications." According to Dr. Rosenberg's letter, the plaintiff informed him that he was sensitive to irritants. Relying upon the results of the August 14, 2008, PFT, Dr. Rosenberg opined that the plaintiff had an obstructive defect which prevents him from returning to active duty as a firefighter.

¶ 18 The plaintiff was advised by the Department that he would be placed on unpaid medical leave on November 12, 2008, as the result of his condition and the exhaustion of his one-year

paid medical leave. On October 28, 2008, the plaintiff filed an application with the Board for occupational disease disability benefits pursuant to section 6-151.1 of the Code.

¶ 19 In a letter to Dr. George S. Motto, the Board's consulting physician, dated November 7, 2008, Dr. Morcos wrote that the plaintiff had been placed on the Department's medical rolls "due to chest pain and dyspnea which he had experienced while off-duty." The letter states that the plaintiff‘s medical records indicate that he had undergone "an extensive cardiopulmonary work-up for his condition" and listing the tests he had undergone with a brief description of their results. Dr. Morcos wrote that, although the plaintiff had been receiving extensive medical treatment for his condition, he continued to complain of a persistent cough.

¶ 20 On November 18, 2008, Dr. Motto examined the plaintiff and drafted a written report. Dr. Motto noted that the plaintiff gave a history of a persistent cough which dated back several years, but admitted that he had never been removed from a fire scene because of that condition. In his report, Dr. Motto summarized the various tests that the plaintiff had undergone while under the care of Drs. Giacchino and Rosenberg, noting that the PFT's were compromised by the plaintiff's inability to perform the tests due to coughing. He also noted that the plaintiff "began coughing fairly significantly" and had "paroxysms of coughing" during his examination. Dr. Motto wrote that his examination of the plaintiff revealed that his lungs were "remarkably clear" although he had a history of wheezing. He stated that the plaintiff had been diagnosed as having paroxysms of cough and that his PFT's suggest obstructive disease.

¶ 21 On January 7, 2009, the Board notified the plaintiff that he had an appointment for a medical examination to be performed by Dr. Terrence C. Moisan, a pulmonologist. Thereafter, there was an exchange of correspondence between the plaintiff and the Board regarding his right to select a doctor from the Board's list of qualified physicians to perform the examination. In a

letter dated January 26, 2009, the plaintiff requested that the Board consider Dr. David Cugell, a pulmonologist, who appeared on the Board's approved list of physicians as the designated medical examiner.

¶ 22 The plaintiff consulted with Dr. Peter Werner, a pulmonologist. Dr. Werner authored a report dated February 5, 2009, in which he stated that the plaintiff "has had several exposures to firefighting with his lungs necessitating hospitalization and emergency room treatment." Dr. Werner stated that the plaintiff's PFT performed "within the last year" shows a moderate to severe degree of airways obstruction and hyperinflation of the lungs in keeping with bronchial asthma and COPD. According to the report, the plaintiff was very short winded and "cannot finish a sentence because of coughing spasms and turning blue." However, Dr. Werner noted that the plaintiff's arterial oxygen saturation was normal at 99% and his "air entry is surprisingly good, but some wheezing is appreciated." Dr. Werner did not administer a PFT. He concluded that the plaintiff "clearly [had] hyperreactive airways disease, not only in the form of allergies, but probably also after exposure to the toxic dust and fumes as a firefighter." He also noted that the plaintiff "probably" had COPD. Dr. Werner wrote that he strongly suspected that the plaintiff suffered structural damage of the lungs, "probably" in the form of scarring and bronchiectasis, which had not been worked up at the present time. He recommended that the plaintiff have a spiral CT scan of the chest to determine if there had been smoke inhalation induced damage and concluded that the plaintiff should not return to firefighting, suggesting that it could be life threatening.

¶ 23 On February 12, 2009, the plaintiff filed a motion with the Board in which he objected to the Board's selection of Dr. Moisan to perform his examination and requested that Dr. Cugell be selected to conduct that examination. On February 18, 2009, the Board met and denied the

plaintiff's motion. Thereafter, the plaintiff was notified of the Board's action and directed to undergo an examination by Dr. Moisan.

¶ 24 Dr. Moisan examined the plaintiff on March 11, 2009. In his report of that examination Dr. Moisan wrote that he found the plaintiff's lungs to be completely clear and that there is nothing "historically, on exam or in the records which suggests that he truly has COPD or even asthma." Although Dr. Moisan was of the opinion that the plaintiff could not go back to firefighting due to his protracted coughing and the potential for tussive syncope, there is nothing, in his opinion, indicating that the plaintiff suffered from an airways disease that was caused by his occupation.

¶ 25 On March 17, 2009, the plaintiff underwent a PFT ordered by Dr. Giacchino. The report of that test contains a written notation which states moderate obstruction defect.

¶ 26 On April 6, 2009, the clamant was seen by Dr. Alvin Schonfeld. According to the doctor's report, the plaintiff gave a history of having suffered "massive" smoke inhalation when he was trapped in a building during a fire in 1988. Following that incident, the plaintiff was removed from the scene by ambulance and treated for pneumonia. The plaintiff informed the doctor that it was after this incident that he started having an intermittent cough. The plaintiff also related another episode of smoke inhalation in 1998 following the loss of his respiratory device. The plaintiff reported that, since these episodes, he has noticed that fumes cause severe coughing and dyspnea. In his report, Dr. Schonfeld noted that, on examination, he found, *inter alia*, that the diameter of the plaintiff's air passage was diminished, his lungs were clear, and no wheezing was heard. Dr. Schonfeld indicated that his review of the plaintiff's medical records and his PFT'S showed a moderate or severe obstructive defect without bronchodilator response. According to the report, the plaintiff seemed to demonstrate signs and symptoms consistent with

reactive airway distress syndrome which had caused pan respiratory syndrome of COPD as well as chronic sinusitis. It was Dr. Schonfeld's recommendation that the plaintiff be retired from firefighting due to respiratory and sinus problems and that he undergo a high resolution CT scan.

¶ 27 The Board conducted a series of hearings on the plaintiff's application for an award of occupational disease disability benefits. The plaintiff's medical records were received in evidence as were the reports of the examining physicians. Additionally, the Board heard the testimony of Dr. Schonfeld, the plaintiff, and Dr. Motto.

¶ 28 Dr. Schonfeld testified that the plaintiff's exposure to smoke could cause pansinusitis and COPD. He stated that, based upon the plaintiff's occupational history as related to him, the plaintiff met the criteria for Reactive Airway Dysfunction Syndrome. It was his belief that the plaintiff developed reactive airway distress as the result of low level exposure to smoke and two high level incidents, causing COPD. Dr. Schonfeld admitted that he had not reviewed any of the Department's records and that his conclusion as to the plaintiff's exposure to smoke was based upon information provided by the plaintiff. Dr. Schonfeld testified that he did not consider the PFT attempted on December 18, 2007, as it did not meet applicable guidelines due to the plaintiff's coughing. However, he did find that the PFT administered in August 2008 was partially useful. Dr. Schonfeld testified that the plaintiff suffered from COPD, hyperactivity airways disease, and pansinusitis, and he concluded that the plaintiff should be retired from active firefighting.

¶ 29 The plaintiff testified to his employment history with the Department. He stated that he had been treated by Dr. Giacchino since 2002 for chronic bronchitis. The plaintiff testified that in 1987, while responding to a factory fire, he was exposed to hydrogen peroxide emissions. According to the plaintiff, his cough began in 1988 and became progressively worse.

Nevertheless, he was able to perform his duties as an active firefighter from 1988 through May 2005. He admitted that he was placed on the medical rolls in 1998 due to duty-related eye and shoulder injuries. He stated, however, that while being transported to the hospital, he was given oxygen as the result of having been exposed to heavy smoke conditions. The plaintiff testified that, although he had not been exposed to large scale smoke since 2005, his cough had gotten progressively worse.

¶ 30 Dr. Moto testified that, based upon the plaintiff's medical records, his own evaluation and Dr. Moisan's report, the plaintiff did not have an occupational disease. He expressed doubts about the plaintiff's claims that his cough progressively worsened over the years even though he had not been exposed to smoke for a number of years and the fact that he had never been removed from active duty as a result of that condition. Dr. Motto believed that the plaintiff's lack of response to intensive treatment regimens was indicative of his having been misdiagnosed. According to Dr. Motto, sinusitis is not a medical impairment that would render a firefighter disabled, and considering available treatments, pansinusitis is not disabling and did not prevent the plaintiff from performing his firefighting duties. In discussing Dr. Werner's report, Dr. Motto noted that, on examination, Dr. Werner found the plaintiff's lungs to be completely clear. He also observed that, during Dr. Werner's examination, the plaintiff's oxygen saturation was 99% even though he had been coughing. He testified that the claimant may have been coughing, but it was not due to hyperreactive airway disease or COPD. Although Dr. Motto agreed that an eight-year cough could be indicative of COPD, he stated that the medications which the plaintiff had been receiving are legitimate treatments for hyperactive airway disease and COPD and the fact that the plaintiff's condition never improved meant that his symptoms were not due to those

diseases. When asked for an explanation as to why the plaintiff exhibited paroxysms of cough, Dr. Motto testified that in his belief it was "volitional."

¶ 31 On September 16, 2009, the members of the Board unanimously voted to deny the plaintiff's application for occupational disease disability benefits. On October 15, 2009, the plaintiff filed a two-count complaint in the circuit court seeking administrative review of the Board's denial of his application and of the Board's denial of his motion to select a physician of his choosing from the Board's list of approved physicians to conduct his physical examination.

¶ 32 On May 13, 2010, the circuit court entered an order granting the Board's motion to dismiss count II of the plaintiff's complaint seeking administrative review of the Board's denial of his motion to select a physician of his choosing to conduct his physical examination. On May 26, 2010, the plaintiff filed a motion to exclude Dr. Moisan's report from evidence as having been obtained in violation of section 6-153 of the Code (40 ILCS 5/6-153 (West 2008)). On December 3, 2010, the circuit court entered an order, finding that the Board violated the plaintiff's rights under section 6-153 of the Code when it denied his request to select a physician of his choosing from the Board's approved list of physicians to conduct his examination. As a consequence, the circuit court reversed the Board's decision denying the plaintiff's application for occupational disease disability benefits and remanded the matter back to the Board for a new hearing.

¶ 33 On January 3, 2011, the Board filed a motion to reconsider the circuit court's order of December 3, 2010. On July 10, 2011, the circuit court granted the Board's motion to reconsider and confirmed the Board's decision denying the plaintiff's application for occupational disease disability benefits.

¶ 34 The plaintiff appealed the circuit court's order of July 10, 2011, and on April 16, 2012, this court entered an order in which we found that, pursuant to the clear and unambiguous language of section 6-153 of the Code, the plaintiff should have been permitted to choose the physician who would render a second opinion as to his condition. *Chwarznski*, 2012 IL App (1st) 111933-U, ¶ 28. We, therefore, reversed the circuit court's order of July 10, 2011, and vacated the Board's decision denying the plaintiff's application for disability benefits. In addition, we remanded the matter back to the Board for further proceedings with directions that: evidence of Dr. Moisan's examination and opinion were to be excluded; the plaintiff was to be permitted to select a physician from the Board's approved list who would conduct an examination and render a second medical opinion as to his condition; and the plaintiff was to be permitted to present evidence of that examination and opinion which might be commented on or rebutted by witnesses for the Board. *Id.* ¶¶ 28-32.

¶ 35 The plaintiff's attorney submitted the plaintiff's medical records to Dr. Cugell for a review. Dr. Cugell did not examine the plaintiff. On October 24, 2012, Dr. Cugell issued a report based upon his review of the medical records submitted to him. In his report, Dr. Cugell outlined the records which he had reviewed and concluded that the plaintiff's medical condition warranted his termination from duty as an active firefighter. He based his opinion in this regard upon medical records demonstrating apparent impairment of lung function along with persistent, severe cough. Dr. Cugell wrote that, although, the plaintiff's condition of pan sinusitis may have contributed to his cough, the condition is neither disabling nor related to occupational exposure. Dr. Cugell found the cause of the plaintiff's respiratory impairment to be "unclear." He stated that, although he was unable to identify the cause of the plaintiff's airway disease, there is no doubt that, once established, subsequent exposure to smoke, fumes, dust or strong chemical

odors would "very likely" provoke respiratory symptoms and a further reduction in lung function.

¶ 36 On April 9, 2013, Dr. Motto issued a report to the Board stating that he had reviewed Dr. Cugell's report. Dr. Motto wrote that Dr. Cugell's review did not add any additional information to that which he was aware before his testimony. He disagreed with Dr. Cugell's conclusion that the plaintiff's medical condition warrants his termination as an active firefighter. Dr. Motto confirmed his earlier testimony to the effect that the plaintiff is able to perform his assigned duties with the Department, and that he did not have an occupational disease. He ended his report by stating that his opinions "stand even without consideration of the evidence presented by Dr. Moisan."

¶ 37 When the Board reconvened on April 15, 2013, the trustees were advised that counsel for the Board and the plaintiff had agreed to the admission into evidence of several documents, including Dr. Cugell's report and Dr. Motto's report of April 9, 2013. The Board was also informed that the plaintiff had waived his right to cross examine Dr. Motto or come before the Board to present any additional evidence.

¶ 38 The transcript of the proceedings before the Board on June 18, 2013, reflects that the Board members, with one member abstaining, orally voted to adopt proposed findings of fact that had been prepared by the Board's counsel. There is no record of the Board having voted to deny the plaintiff's application on that date. On that same day, the members of the Board signed a written decision which contained findings of fact and conclusions. On the following day, June 19, 2013, the matter again came before the Board at which time a motion was made and seconded to grant the plaintiff's application. A vote was taken, and the members of the Board orally voted against the motion. However, no motion was ever made or voted on to deny the

plaintiff's application for occupational disease disability benefits. On June 19, 2013, the Board again entered a written decision which contained findings of fact and conclusions.

¶ 39 On July 23, 2013, the plaintiff filed a motion in the circuit court to reinstate the instant action, asserting that the Board on remand had denied his application for benefits on June 19, 2013, and that he was notified of the decision on June 28, 2013. The matter came before the circuit court on August 7, 2013, and the court entered an order granting the Board 45 days to supplement the record.

¶ 40 On September 18, 2013, the Board filed its supplemental answer to the plaintiff's complaint for administrative review. Included within the Board's supplemental answer was a copy of its written decision of June 19, 2013.

¶ 41 According to the Board's brief before this court, the Board acknowledged that its decision of June 19, 2013, did not comply with this court's decision in *Howe v. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago*, 2013 IL App (1st) 122446, ¶¶ 19-26, which held that a written decision by the Board in the absence of both a motion to deny an application for disability benefits and a motion to adopt its written decision is not a final administrative decision. Consequently, the Board again met on November 20, 2013. The transcript of the Board's proceedings on that date reveal that one of the Board members made the following statement and motion:

> "In the matter of John W. Chwarzynski, the Findings of Fact have been distributed to all Trustees and all Trustees have had an opportunity to review those Findings of Fact. Based on those Findings of Fact, I would like to make a motion to deny Mr. Chwarzynski the benefit that he is seeking."

The motion was seconded and the four members of the Board who were present unanimously voted to deny the plaintiff's application. However, no vote was ever taken to adopt the proposed findings of fact or the written decision containing those findings which was entered by the Board on that same day. It also appears that the written decision of November 20, 2013, "inadvertently," as the Board describes it, "erroneously contained the Board's original decision" which this court vacated in our earlier decision. See *Chwarznski*, 2012 IL App (1st) 111933-U, ¶ 31. To compound matters, it was the erroneous decision of November 20 that the Board's attorney sent to the plaintiff on November 26, 2013. The Board also admits that, on December 5, 2013, the Boards counsel filed "a Second Supplemental Answer Pursuant to Remand Hearing ('Second Supplemental Answer') that also inadvertently contained the erroneous written decision of the Board."

¶ 42 Thereafter, the Board filed a motion to withdraw its Second Supplemental Answer and requested that the circuit court remand the matter back to the Board for the sole purpose of adopting a written decision that is consistent with its vote following the hearing on remand. On May 23, 2014, the circuit court granted the Board's motion over the objection of the plaintiff.

¶ 43 The matter came before the Board on June 18, 2014. The transcript of the Board proceedings on that date reflect that one of the members made the following motion:

> "Mr. President, consistent with the remand from the Circuit Court and having provided a copy of the findings of Fact as distributed by counsel, I make a motion to adopt them."

The motion was seconded and adopted by an affirmative vote of six members with one abstention. On that same day, the Board entered a unanimous written decision, and a copy was mailed to the plaintiff. On July 24, 2013, the Board filed its "Supplemental Answer" which

contained a copy of its written decision entered on June 18, 2013. In that decision, the Board concluded, in relevant part, that: the plaintiff does not have an occupational disease as defined in section 6-151.1 of the Code that renders him incapable of performing his assigned duties; the plaintiff failed to meet his burden of proving that he is entitled to receive an occupational disease disability benefit pursuant to section 6-151.1 of the Code; and, as an alternative basis to deny his application, the plaintiff failed to produce evidence from a licensed physician appointed by the Board showing an occupational disease which caused his disability.

¶ 44 On January 8, 2015, the circuit court entered an order affirming the Board's decision. This appeal followed.

¶ 45 The plaintiff argues that the circuit court erred in allowing the Board to withdraw its Second Supplemental Answer which contained the Board's decision of November 20, 2013, and remanding the matter back to the Board for the purpose of adopting a written decision. The plaintiff asserts that an administrative agency has no authority to alter or amend a final decision once rendered absent an action to review that decision filed within 35 days of its issuance as provided in section 3-103 of the Administrative Review Law (735 ILCS 5/3-103 (West 2012)). *Sola v. Roselle Police Pension Board*, 342 Ill. App. 3d 227, 232 (2003).

¶ 46 The Board responds by arguing both that (1) the circuit court has the authority under section 3-111(a)(2) of the Administrative Review Law (735 ILCS 5/3-111(a)(2) (West 2012)) to remand a matter back to an administrative agency to adopt a decision which contains findings which make a judicial review possible (*Reinhardt v. Board of Education of Alton Community Unit School District No. 11*, 61 Ill. 2d 101, 104-105 (1975)), and (2) that its decision of November 20, 2013, was not a final administrative decision as no vote was ever taken to adopt the findings contained within that decision.

¶ 47 We agree with the Board on this issue. Section 3-101 of the Administrative Review Law defines an administrative decision as one which terminates the proceedings before the agency. 735 ILCS 5/3-101 (West 2012). In *Howe*, this court held that the decision of an administrative agency must be in writing and adopted by vote taken in open session. *Howe*, 2013 IL App (1st) 122446, ¶¶ 19-26. In this case, no vote was ever taken to adopt the written decision issued by the Board on November 20, 2013, which was filed as part of the Board's Second Supplemental Answer. As a consequence, there was no final administrative decision before the circuit court which was capable of review. Pursuant to section 3-111(a)(2) of the Code, the circuit court has the power "to make any order that it deems proper for the amendment, completion or filing of the record of proceedings of the administrative agency." 735 ILCS 5/3-111(a)(2) (West 2012). Absent the entry of an order granting the Board's motion to withdraw its Second Supplemental Answer and remanding the matter back to the Board for the purpose of allowing it an opportunity to adopt, by vote in an open meeting, a written decision in compliance with our decision in the plaintiff's earlier appeal (*Chwarznski*, 2012 IL App (1st) 111933-U, ¶¶ 28-32), there was no final administrative decision in this matter which was subject to review by the circuit court. For this reason, we find no error in the circuit court's order of May 23, 2014, which granted the Board's motion to withdraw its Second Supplemental Answer and remanded the matter back to the Board.

¶ 48 Next, the plaintiff argues that the Board's decision of June 18, 2014, which denied his application for occupational disease disability benefits is both against the manifest weight of the evidence and contrary to law. The plaintiff contends that the Board's conclusions that he failed to meet his burden of proof under sections 6-151.1 and 6-153 of the Code are both legally erroneous and against the manifest weight of the evidence. We disagree.

¶ 49 The instant case presents the question of whether the Board's denial of the plaintiff's application for occupational disease disability benefits pursuant to section 6-151.1 of the Code is supported by the evidence of record. The question is one of fact. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 534 (2007). The findings and conclusions of an administrative agency on questions of fact are prima facie true and correct. 735 ILCS 5/3-110 (West 2012). On review of a decision of an administrative agency, it is not a court's function to resolve factual inconsistencies, reweigh evidence, or to make an independent determination of factual issues. *Barringer v. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago*, 316 Ill. App. 3d 1175, 1177 (2000). Rather, it is the court's function on review to determine whether the agency's findings of fact or conclusions are against the manifest weight of the evidence. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992). An agency's findings of fact are against the manifest weight of the evidence only if an opposite conclusion is clearly evident. *Id.* This deferential standard requires that the agency's decision be affirmed on review if the record contains any competent evidence to support its decision. *Barringer*, 316 Ill. App. 3d at 1177. It is the function of the administrative agency to judge the credibility of the witnesses, weigh the evidence, and resolve any conflicts in the evidence. *Id.* at 1178. A reviewing court will not substitute its judgment for that of the agency merely because an opposite conclusion is reasonable or the reviewing court might have ruled differently. *Abrahamson*, 153 Ill. 2d at 88.

¶ 50 The plaintiff applied for occupational disease disability benefits pursuant to section 6-151.1 of the Code which provides, in relevant part, that:

> "Any active fireman who has completed 7 or more years of service and is unable to perform his duties in the Fire Department by reason of heart disease,

> tuberculosis, any disease of the lungs or respiratory tract, AIDS, hepatitis C, or stroke resulting from his service as a fireman, shall be entitled to receive an occupational disease disability benefit during any period of such disability for which he does not have a right to receive salary." 40 ILCS 5/6-151.1 (West 2008).

¶ 51 As the applicant for occupational disease disability benefits, the plaintiff had the burden of proving that: (1) he is a firemen with 7 or more years of service; (2) he suffers from one of the conditions enumerated in the statute; (3) the condition resulted from his service as a fireman; and (4) the condition renders him unable to perform his fire department duties. There is no question that the plaintiff is a fireman with more than 7 years of service. However, the record reveals a factual dispute surrounding the three remaining elements. The record contains conflicting medical evidence with respect to the condition from which the plaintiff suffers, whether that condition resulted from his service as a fireman, and whether that condition renders him unable to perform the duties of a fireman.

¶ 52 Drs. Rosenberg, Giacchino, Liberman, Kanter, Werner, Stankiewicz, Schonfeld, and Cugell each found that the plaintiff either suffered from some form of impairment of lung function or sinusitis along with a persistent cough. At various times during his treatment of the plaintiff, Dr. Rosenberg diagnosed moderate obstruction defect, a debilitating cough, hyperactive airways, COPD, pansinusitis, chronic sinusitis, and GERD. Dr. Lieberman's report of the plaintiff's CT scan of February 28, 2008, contains an impression that the plaintiff has pansinusitis. Dr. Stankiewicz's post-operative report of May 14, 2008, noted that the plaintiff suffered from chronic sinusitis which may be contributing to his lung disease. Dr. Kanter's report of a PFT test which was attempted on August 14, 2008, states that the portions of the test

that were conducted suggest a pattern of reversible airways obstruction. Dr. Giacchino wrote in his letter of September 9, 2008, that the tests performed on the plaintiff in his office showed COPD, moderate obstructive defect, and chronic bronchitis. Dr. Werner concluded that the plaintiff had airways disease and probably COPD. He also strongly suspected that the plaintiff suffered from structural damage to his lungs. Dr. Schonfeld testified that the plaintiff suffered from COPD, hyperactivity airways disease and pansinusitis. Dr. Cugell found that the plaintiff's medical records demonstrate apparent impairment of lung function and a severe cough.

¶ 53 Dr. Motto was of the opinion that the plaintiff had been misdiagnosed based upon his lack of response to intensive treatment regimens for hyperactive airways disease and COPD. He testified that the fact the plaintiff's condition never improved meant that his symptoms were not caused by those diseases. Dr. Motto also noted that he, and each of the physicians who examined the plaintiff, found that his lungs were clear. He was also of the opinion that the plaintiff's coughing was not caused by airways disease or COPD; rather, he found it to be volitional. Additionally, the record reflects that the plaintiff's chest x-ray and CT scan on November 12, 2007, demonstrated that his lungs were clear, and his oxygen saturation level was consistently measured between 97% and 99%.

¶ 54 In its decision, the Board discounted the opinions of Drs. Schonfeld and Werner because they relied, in part, upon uncorroborated information from the plaintiff as to his smoke exposure. As for the plaintiff's testimony, the Board found him lacking in credibility. It found that the records of the Department of the 1988 and 1998 incidents which the plaintiff related to Dr. Schonfeld did not support his claim of any acute injury to his lungs from toxic fumes or smoke. The Board also found that neither pansinusitis nor GERD are occupational diseases under section

6-151.1 of the Code. Relying upon Dr. Motto's opinions, the Board concluded that the plaintiff did not have an occupational disease as defined in section 6-151.1 of the Code.

¶ 55 On the question of whether the plaintiff is unable to perform the duties of a fireman, Drs. Rosenberg, Giacchino, Werner, Schonfeld, and Cugell were each of the opinion that he was not capable of returning to active duty as a fireman. In its decision, the Board never made a finding as to whether it found the plaintiff capable of performing the duties of a fireman, only that he does not have an occupational disease that renders him unable to perform those duties. Dr. Werner found that the plaintiff had hyperreactive airways disease that was "probably" from exposure to toxic dust and fumes as a firefighter. Dr. Schonfeld opined that the plaintiff developed reactive airway distress as a result of low level exposure to smoke and two high level incidents which the plaintiff related to him. As noted earlier, however, the Board discounted the opinions of Drs. Werner and Schonfeld and relied upon Dr. Motto's opinion that the plaintiff is not suffering from an occupational disease as defined in section 6-151.1 of the Code which includes any disease of the lungs or respiratory tract. As for the diagnosis that the plaintiff suffers from sinusitis, both Dr. Motto and Dr. Cugell opined that condition is not disabling.

¶ 56 The resolution of the conflicts in medical testimony that appear in this record was a matter to be resolved by the Board. It resolved the conflict by basing its decision on the opinions of Dr. Motto. Whether we would have decided the issue in the same manner is not the test of whether the Board's decision is against the manifest weight of the evidence; rather, the question is whether the record contains sufficient evidence to support the Board's conclusion, and we cannot say, in this case, that an opposite conclusion is clearly evident.

¶ 57 As an alternative basis for denying the plaintiff's application, the Board found that the plaintiff failed to furnish proof from a licensed and practicing physician appointed by it that he suffered from an occupational disease. We agree.

¶ 58 Section 6-153 of the Code provides, in relevant part, that: "Proof of *** occupational disease *** shall be furnished to the Board by at least one licensed and practicing physician appointed by the Board." 40 ILCS 5/6-153 (West 2008). The requirement is mandatory. *Nowak v. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago*, 315 Ill. App. 3d 403, 411-12 (2000). The Code defines "occupational disease" as follows:

> "A sickness, disease or illness of the heart, lungs, or respiratory tract of a fireman, arising solely out of his employment as a fireman, due to exposures to heat and extreme cold, inhalation of heavy smoke, fumes or poisonous, toxic or chemical gasses while in the performance of active duty in the fire department. 'Occupational disease' also includes cancer." 40 ILCS 5/6-112 (West 2008).

¶ 59 In this case, neither Dr. Motto nor Dr. Cugell rendered an opinion that the plaintiff suffers from an occupational disease as that term is defined in the Code. Dr. Motto was clearly of the opinion that the plaintiff does not suffer from an occupational disease. Dr. Cugell, although of the belief that the plaintiff's medical records demonstrate impairment of his lung function, wrote in his report that the cause of the plaintiff's respiratory impairment is "unclear." Absent a finding that the illness from which the plaintiff suffers arose solely out of his employment as a fireman, Dr. Cugell's report does not provide proof that the plaintiff suffers from an occupational disease.

¶ 60 Based upon the foregoing analysis, we conclude that the Board's findings that (1) the plaintiff does not have an occupational disease that renders him incapable of performing his assigned duties, (2) he failed to produce evidence from a licensed and practicing physician

appointed by the Board that he suffers from an occupational disease, and (3) that he failed to meet his burden of proving his entitlement to an occupational disease disability benefit under section 6-151.1 of the Code, are not against the manifest weight of the evidence. We, therefore, affirm the judgment of the circuit court which confirmed the Board's decision denying the plaintiff's application for occupational disease disability benefits.

¶ 61 Affirmed.