2019 IL App (1st) 181900-U

SIXTH DIVISION
September 6, 2019

No. 1-18-1900

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

JERRY VALADEZ, Plaintiff-Appellant, v. HARVEY FIREFIGHTERS' PENSION FUND, and BOARD OF TRUSTEES OF THE HARVEY FIREFIGHTERS' PENSION FUND, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 17 CH 12273 Honorable Michael Tully Mullen, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the Board's denial of plaintiff's application for line-of-duty disability benefits where the Board's determination was not supported by the evidence.

¶ 2 Plaintiff, Jerry Valadez, appeals the order of the circuit court affirming the determination of defendant Board of Trustees of the Harvey Firefighters' Pension Fund (Board), to deny his application for line-of-duty disability benefits. On appeal, plaintiff contends that (1) the Board's

determination was against the manifest weight of the evidence, and (2) he was deprived of due process where the Board that decided against him was comprised of four members instead of five as required by statute. For the following reasons, we reverse.

¶ 3 JURISDICTION

¶ 4 The trial court entered its order affirming the Board's decision on August 7, 2018. Plaintiff filed his notice of appeal on August 31, 2018. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. July 1, 2017), governing appeals from final judgments entered below.

¶ 5 BACKGROUND

¶ 6 On April 17, 2017, the Board held a hearing on plaintiff's petition for a line-of-duty disability pension pursuant to section 4-110 of the Illinois Pension Code (Code) (40 ILCS 5/4-110 (West 2016)). During the hearing, plaintiff amended his petition to include a request for a "not in duty" disability pension in the alternative.

¶ 7 At the hearing, plaintiff testified that he was born on May 24, 1962, and was hired by the city of Harvey on November 3, 1997, as a full-time firefighter. As a firefighter, plaintiff performed suppression, first responder, and emergency medical service duties while wearing heavy protective equipment. These duties included the extrication of victims from vehicles in an accident. The Department of Labor classifies such duties in the highest physical requirement category. Plaintiff had passed a pre-employment physical examination, and did not receive medical treatment for his lower back prior to his employment.

¶ 8 In 2007, plaintiff experienced leg and back pain but thought it was because "[his] shoe wasn't fitting right." The pain did not relate to a specific act of firefighting duty or the cumulative effects of such duty. An MRI from February 16, 2007, showed a small right

paracentral protruded herniated disc at the L3-L4 level and a moderately sized left paracentral protruded herniated disc at the L4-L5 level. Plaintiff received a steroid injection and continued to work full and unrestricted duty until November of 2011.

¶ 9 On November 24, 2011, plaintiff worked on an extrication situation in Phoenix, Illinois. Plaintiff testified that he injured his back while trying to lift a patient from a vehicle. He verbally reported the incident to his supervisor and the deputy fire chief, but he did not file a written report. Plaintiff subsequently filed a worker's compensation claim. On November 30, 2011, plaintiff saw Dr. Lim regarding his pain. Dr. Lim's report of the visit stated: "This is a patient we saw in 2007. He had radicular symptoms at that time and left sided disc herniation L4-5. He had an epidural and therapy and with that was significantly better. He states that all of his pain has returned with the last 3 months. No known precipitating events."

¶ 10 On December 29, 2011, plaintiff saw Dr. Qasim, whose note indicated that after feeling pain in 2007, plaintiff received a steroid injection and "felt great after that and did not need any more medical attention." The note stated that in 2007 "the pain was not severe enough and he managed with taking some over-the-counter medications and getting one steroid injection in the back." Plaintiff subsequently "continue[d] his day-to-day work which involved pretty heavy amounts of lifting and lots of physical labor following that episode. Over the past few weeks he noticed a return of his pain but this time the pain was extremely severe." Dr. Qasim also noted that the onset of plaintiff's pain was gradual, and the cause was unknown. It is unclear whether the note referred to the onset of pain in 2007 or plaintiff's pain in 2011.

¶ 11 An MRI was performed on December 5, 2011. It showed "mild to moderate hypertrophy of the facet joints bilaterally at L1-L2, L2-L3, and L3-L4 levels, *** moderate bilateral foraminal stenosis at the L2-L3 level," a "paracentral protrusion and central annual fissure in the

disk" at level L3-L4," and at the L4-L5 level a "diffuse bulge of the intervertebral disk *** which is also causing displacement of the L5 nerve root on the left side." Plaintiff was prescribed muscle relaxants as well as Norco, an opioid pain reliever. He also received a lumbar epidural steroid injection. Plaintiff began physical therapy and in March 2012 he reported to Dr. Lim that his pain was gone. Plaintiff returned to full and unrestricted firefighting duty on March 19, 2012.

¶ 12 On July 25, 2013, plaintiff was involved in a car accident. While stopped, plaintiff's vehicle was rear-ended by another vehicle traveling at a high rate of speed. Although he was hospitalized for back pain, he did not miss work and continued his full-time firefighting duties.

¶ 13 On June 24, 2014, plaintiff was called to a multiple car garage fire. Plaintiff was on the hose line and while retreating from the burning structure, plaintiff tripped over his lieutenant who had fallen behind him. Plaintiff fell on his back and onto his oxygen tank. He was taken by ambulance to the hospital with no delay in treatment. The treating physician at the hospital prescribed physical therapy, pain medication and muscle relaxers. He was returned to full and unrestricted firefighting duty on July 25, 2014.

¶ 14 On September 24, 2014, plaintiff saw Dr. Richard Bonk. The examiner's history noted that plaintiff has "prior back problems" and "was injured at work, June 24, 2014 in an auto garage fire" when he tripped over another firefighter. A physical examination revealed no apparent abnormalities. Dr. Bonk diagnosed plaintiff with sciatica and provided a prescription of Norco to be refilled "until patient can be seen by ortho who will be managing care."

¶ 15 On October 7, 2014, plaintiff saw Dr. Sergey Neckrysh. The clinic note stated that Dr. Neckrysh reviewed imaging and plaintiff's symptoms and found "he does have severe lateral recess and foraminal stenosis caused by his work related injuries" and recommended plaintiff

"proceed with L3-4 and L4-5 decompression, instrumentation and fusion, interbody and posterolateral." Plaintiff agreed to have the surgery.

¶ 16 On October 20, 2014, plaintiff was involved in an extrication of an accident victim from a van. While manipulating her onto a backboard, plaintiff felt pain. He did not seek medical attention or file a written report because he had already decided to have lumbar fusion surgery as recommended by Dr. Neckrysh. Plaintiff had low back fusion surgery on December 1, 2014, followed by physical therapy. On April 22, 2015, plaintiff saw Dr. Bonk regarding labs that showed elevated liver enzymes. He was advised to discontinue all acetaminophen and statin medications, and to seek pain management options with Dr. Neckrysh. On a subsequent visit, Dr. Bonk refused to provide a refill of Norco in light of plaintiff's abnormal liver condition.

¶ 17 On June 3, 2015, plaintiff consulted with Dr. Ebby Jido for a pain management evaluation. The notes describe the June 24, 2014 work incident as resulting in back and buttock pain, and plaintiff's back surgery. Plaintiff stated that physical therapy helped with the pain, along with Tylenol and short acting opioids. However, plaintiff's pain is exacerbated as his medications were stopped due to elevated liver enzymes. Plaintiff was diagnosed with lumbar post fusion syndrome.

¶ 18 On July 3, 2015, plaintiff underwent a functional capacity evaluation (FCE) that showed he could work at a very heavy physical demand level consistent with his position as a firefighter. After a course of physical therapy, plaintiff felt stronger and had a desire to return to work. X-rays of his back revealed a "[s]table appearance of the lumbar spine in the postsurgical interval." Dr. Neckrysh performed a follow up examination and found that plaintiff "is doing great. His back pain is gone." Dr. Neckrysh determined that plaintiff could return to unrestricted firefighting duty on July 13, 2015.

¶ 19 During a visit with Dr. Bonk on October 16, 2015, plaintiff requested referrals for pain management and a back surgeon.

¶ 20 On October 21, 2015, plaintiff was on duty and responded to an automobile accident that required extrication of victims. While performing the extrications, plaintiff felt pain in his back and right buttock. He could not stand up. Plaintiff told his lieutenant, Omari Rashedi Silvera, that he hurt his back. Silvera then informed the shift commander, Adam Wojciechowski of plaintiff's injury. Plaintiff was transported from the scene to the hospital. A CT scan revealed no acute injury. As his symptoms improved, plaintiff was discharged with a diagnosis of chronic back pain exacerbation.

¶ 21 Dr. Neckrysh saw plaintiff on January 7, 2016, for a follow up examination. He noted that a recent lumbar MRI "looks good. There are no concerning findings on the MRI." Dr. Neckrysh also stated that plaintiff could no longer work as a firefighter. An addendum was included clarifying that plaintiff is able to drive and operate equipment lifting no more than 35 pounds and no frequent lifting at 20 pounds. Plaintiff testified that he has pain, numbness, and a needle sensation in his lower back and buttocks. His back pain affects daily activities and he currently uses medical marijuana for pain management because acetaminophen and Norco adversely affected his liver.

¶ 22 Lieutenant Wojciechowski testified that he requested plaintiff and Lieutenant Silvera to respond to the accident scene on October 21, 2015, because it was a heavy extrication requiring additional manpower. He saw plaintiff removing victims onto a backboard. After the victims were removed, Silvera came to him and informed him that plaintiff was injured. He saw plaintiff was in pain and requested an ambulance to transport him to the hospital.

¶ 23 Lieutenant Silvera testified that he and plaintiff responded to a severe vehicle accident where three victims needed to be extricated from vehicles. Plaintiff used extrication tools and removed the victims. After the last victim was removed, plaintiff reported that he hurt his back. Silvera notified his commander of plaintiff's injury.

¶ 24 Dr. Neckrysh provided a letter regarding his treatment of plaintiff. The letter stated that plaintiff was a patient who "suffered a series of work-related accidents for which he eventually underwent surgery on December 1, 2014." He was cleared for "full-duty release" in July 2015. Upon his return to duty in July, plaintiff "was helped a lot by the younger guys who would step in and help [him] for any heavy work in recognition of [plaintiff's] recent spine surgery." However, plaintiff "always [took] the lead in live fire events, and he noticed that whenever he had to carry equipment, to pick up anything more than negligible weight, he would experience significant back pain, which would then last for three to four days after the lifting accident or this type of work event." Plaintiff used his vacation days so that upon his return to duty, he only had to work "one shift every five days" which allowed him "to recuperate following any activity which aggravated his low back pain. This factor allowed him to endure his firefighting duties for some time." After the October 21, 2015, incident, a CT scan and MRI of the lumbar spine was ordered and plaintiff was "taken off work." On January 7, the MRI was reviewed and an "absence of adjacent segment failure" was confirmed. Also, Dr. Neckrysh "had a long conversation with [plaintiff] and *** recommended for him to remain off duty with lifelong restrictions. We advised him that he is no longer able to work as a firefighter."

¶ 25 Dr. Neckrysh also answered specific interrogatives. When asked whether plaintiff's disability "relates to either or both the June 24, 2014, and October 21, 2015 work injuries," Dr. Neckrysh answered that it does relate "to the condition of the lumbar spine which was caused by

a series of injuries, including injuries of June 24, 2014, and October 21, 2015." It was his opinion that plaintiff "should not return to work as a firefighter ever again in his life."

¶ 26 The Board also considered the reports of three physicians selected to examine plaintiff as required by section 4-112 of the Code (405 ILCS 5/4-112 (West 2016)). All three physicians examined plaintiff and reviewed medical records, injury reports, a job description, and the opinion letters of Dr. Neckrysh and Dr. Kornblatt, in preparing their reports.

¶ 27 In his report, Dr. Dalip Pelinkovic noted that plaintiff is a firefighter who must "perform prolonged hours of work under adverse conditions." In 2007, plaintiff was diagnosed with lumbar radiculopathy. An MRI dated February 16, 2007, showed disk protrusion at L3-L4, "moderately sized left paracentral disk herniation" at L4-L5, and moderate nerve compression at L5. On November 30, 2011, plaintiff visited Midwest Orthopedic Consultants because "all his pain returned within the last 3 months. No known precipitating events." An MRI dated December 5, 2011, showed disk protrusions and degeneration at L3-L4, with compromise of the right L4 nerve root, and at L4-L5 there was "paracentral herniation with compromise to the left L5 nerve root."

¶ 28 Plaintiff began a physical therapy program and he "responded well to physical therapy and all treatment methods." He was cleared to return to full work duty on March 14, 2012. On June 24, 2014, plaintiff "was injured at work in an auto garage fire." He was treated at Ingalls Memorial Hospital for a back injury and was discharged. Diagnostic imaging on July 3, 2014, showed "[n]o change in pathology in comparison to the previous study." Plaintiff sought a second opinion and was told the MRI "was much different." He was put on Norco for pain.

¶ 29 On December 1, 2014, plaintiff had surgery performed by Dr. Neckrysh. At a follow-up appointment, plaintiff requested a refill of his pain medication because he has persistent back

pain. Plaintiff began physical therapy and on July 3, 2015, his physical abilities were assessed. Plaintiff demonstrated physical abilities "consistent with very hard physical demand level according to the job requirements."

¶ 30 On October 21, 2015, plaintiff responded to a motor vehicle accident in which he extricated passengers. He was seen on November 12, 2015, with increased lower back pain "worse than before the event." An MRI dated December 17, 2015, showed post-surgical changes to L3-L5, but [n]o evidence of recurrent herniation." In January 2016, plaintiff saw Dr. Neckrysh for back pain and he was diagnosed with chronic back pain. Dr. Neckrysh recommended that plaintiff "not return to work as a firefighter ever again in his life." Dr. Pelinkovic reviewed plaintiff's MRIs and found they do not "reveal any residual stenosis or recurrent disk herniation. The spacers are in place. There is no dislocation."

¶ 31 Dr. Pelinkovic opined that plaintiff's work injuries from June 24, 2014, and October 21, 2015, prevent plaintiff, "with reasonable and surgical certainty, from unrestricted duties of a firefighter." His condition precludes him from performing such duties because he is unable to lift, twist, bend, or stand for prolonged periods of time. Dr. Pelinkovic stated that plaintiff "has reached Maximum Medical Improvement at the present point in time. He has done enough physical therapy. I do think his disability is permanent."

¶ 32 Dr. Pelinkovic also believed that plaintiff's lifting and extricating of victims "could have aggravated and exacerbated new pain in the lumbar spine in the area where he has a partial union and fusion." He acknowledged that plaintiff had a pre-existing condition, but noted that with physical therapy the condition "did not preclude him from going back to work." He concluded that the surgery and second injury rendered plaintiff disabled. He explained that the "second

injury exacerbated [plaintiff's] lower back fusion syndrome." Dr. Pelinkov believed that plaintiff could "perform in a light duty capacity *** with no more lifting than 10 pounds."

¶ 33 Dr. Thomas Gleason also examined plaintiff at the Board's request. Dr. Gleason's report noted that plaintiff had three work-related incidents where he was injured. On November 24, 2011, plaintiff was rescuing a person that crashed a car into a house and plaintiff had to lift the person out of a tight space. He informed his supervisor but did not go to the hospital because it was Thanksgiving. He was given medication and attended physical therapy, and returned to work. On June 24, 2014, plaintiff was using a fire house to put out a fire when he tripped over a lieutenant who had fallen on the ground. Plaintiff fell backwards onto his oxygen tank and reinjured his back. He was taken to the hospital and prescribed Norco and physical therapy. After undergoing lumbar fusion surgery on December 1, 2014, plaintiff returned to full duty in July 2015 after physical therapy and work conditioning.

¶ 34 On October 21, 2015, plaintiff responded to a motor vehicle accident. He had to extricate three victims, one who weighed over 300 pounds and another who weighed 225 pounds. After pulling out the third victim, plaintiff felt pain in his lower back and collapsed to the ground. He was taken to the hospital and given an injection for inflammation and morphine. Plaintiff's surgeon, Dr. Neckrysh, advised plaintiff that he was unable to return to work. Dr. Gleason's report stated that plaintiff presently uses "medical marijuana due to bleeding from taking Norco, which he has discontinued." Plaintiff does not take any other medication.

¶ 35 Dr. Gleason reviewed diagnostic reports including post-operative x-rays, CTs and MRIs. The reports show post-operative changes, no evidence of hardware loosening, and "overall good alignment." He diagnosed plaintiff with "[l]umbar syndrome with numbness right buttock, increased subsequent to injury of October 21, 2015."

¶ 36 Dr. Gleason opined that plaintiff suffers from a permanent disability "related to his low back condition, which is at maximum medical improvement." Plaintiff's condition is what would be expected from "an individual having undergone a low back decompressive laminectomy, a posterior lateral fusion, a posterior lumbar interbody fusion ***, given physical demands of a fire fighter, a very heavy physical demand level occupation." Dr. Gleason concluded, "to a reasonable degree of certainty that the cause of [plaintiff's] disability was the reported accident of October 21, 2015," because although plaintiff had reported pain before the incident, he was still able to work. He stated that "[t]he accident of October 21, 2015 as described could be consistent with an aggravation of a pre-existing condition such as the [plaintiff] had, under which circumstances he could not return to his very heavy physical demand level job as a fire fighter. In this case the active fire fighting duty, in conjunction with the cumulative effects of acts of fire fighting, did cause [plaintiff's] disability, in as much as his pre-existing condition as of October 21, 2015 was affected by cumulative events of acts of fire fighting." Dr. Gleason opined that plaintiff's acts of duty exacerbated his pre-existing condition and contributed to his disability. He believed that plaintiff "could perform in a light to medium level" of physical activity.

¶ 37 Dr. Carl Graf submitted the final report considered by the Board. Dr. Graf noted that plaintiff was able "to easily accomplish the entire physical examination." He stated that while plaintiff rates himself in the "severe disability" category, "it should be noted that he takes no pain medications." Dr. Graf would consider plaintiff's diagnosis to be "preexisting lumbar spondylosis. It is my opinion that the lumbar decompression and fusion surgery performed was [*sic*] secondary to his preexisting condition and bears no relation to his work activities." Dr. Graf found "it interesting that [plaintiff] returned to work full duty following the surgery then had subsequent multiple recurrent complaints." He discounted Dr. Neckrysh's opinion that plaintiff

was disabled because he "initially stated that there were no work restrictions then subsequently took such back stating that [plaintiff] was completely disabled."

¶ 38 Dr. Graf specifically noted that Dr. Michael Kornblatt examined plaintiff in November 2014, for an independent medical evaluation, and found that "his lumbar degenerative disc disease is unrelated to the work incident and was not caused, aggravated or accelerated by his preexisting condition." The record on appeal does not contain Dr. Kornblatt's report, nor do the parties refer to his report in the briefs. Dr. Graf's report, however, did recount Dr. Kornblatt's findings in detail. According to Dr. Graf, in 2014 Dr. Kornblatt found plaintiff's diagnosis "consistent with mechanical low back pain with known chronic multilevel lumbar degenerative disc disease as well as a history of work related lumosacral [*sic*] strain and contusion which occurred June 24, 2014." The report stated that plaintiff's degenerative disc disease was unrelated to the work incident, and that the incident did not aggravate or accelerate the preexisting condition. It further stated that the surgery would only treat plaintiff's preexisting condition.

¶ 39 On February 29, 2016, Dr. Kornblatt performed another independent evaluation. He diagnosed plaintiff with postoperative L3-L5 decompression, and posterior spine fusion with failed back surgery syndrome. He stated that this diagnosis is unrelated to a specific work incident but related to plaintiff's preexisting condition. He also diagnosed plaintiff with a work related lumbosacral strain that occurred on October 21, 2015. He stated that plaintiff would be capable of resuming light to medium physical demand work at this point with no lifting greater than 30 pounds and no more than 15 pounds frequently.

¶ 40 Dr. Graf then answered specific questions posed by the Board. When asked whether plaintiff suffers "from a disabling lumbar spine condition that prevents him from performing the full and unrestricted duties of a firefighter," Dr. Graf answered:

> "[Plaintiff] has now undergone a lumbar decompression and fusion at two levels. He is 54 years old. While such could preclude one from returning to a full duty level status, he did complete a functional capacity evaluation which demonstrated he was able to return to his full duty level status following his surgery. Subsequent to such, [plaintiff] had subjective complaints of pain despite no changes in imaging studies and the same surgeon who returned him to full duty subsequently placed him on complete disability. Such cannot be objectively substantiated."

Dr. Graf also believed that plaintiff's "current condition is not disabling in nature and would not preclude him from performing full and unrestricted firefighting duties."

¶ 41 When asked whether an act of firefighting duty or the accumulative effects of firefighting duty caused plaintiff's disability, Dr. Graf answered "Not applicable." When asked whether plaintiff's preexisting condition was exacerbated by an act of firefighting duty, Dr. Graf stated that his condition "bears no relation to any work related incident. These degenerative and compressive findings remain stable throughout the years until his subsequent surgery." Dr. Graf further opined that "no further care or treatment is necessary or warranted regardless of causation." He believed that plaintiff "is capable of returning to his full duty level job as described."

¶ 42 After the hearing, the Board found that plaintiff was not entitled to a "line of duty" disability pension, but was entitled to a "not in duty" disability pension. The Board accorded weight to the opinions of Dr. Gleason and Dr. Pelinkovic that plaintiff "is disabled as a result of

lumbar syndrome." The Board also credited plaintiff's testimony that he suffers disabling lower back pain. Therefore, it found that plaintiff is permanently disabled pursuant to the Code.

¶ 43 The Board, however, gave weight to Dr. Graf's opinion that plaintiff's disability "did not result from the performance of an act of duty or the cumulative effects of acts of duty." It noted that objective medical imaging supported Dr. Graf's opinion. Plaintiff's pain began in 2007 with no act of duty as a precipitating cause. Although on June 24, 2014, plaintiff complained of back pain suffered while fighting a fire, a subsequent MRI showed no change in pathology from the December 2011 MRI. Plaintiff also claimed he injured his back on October 20, 2014, but he did not seek medical treatment or report the injury. He "ultimately underwent a 2 level fusion at L3-L4 and L4-L5 to repair the preexisting pathology that had existed since 2007 and was unrelated to any act of duty." Plaintiff was released to full duty on July 3, 2015.

¶ 44 In October 2015, plaintiff complained of lower back and leg pain with "no significant interval events." The Board found that "[f]ive days later, on October 21, 2015, [plaintiff] claimed that he injured his back. However, [plaintiff] underwent a MRI on December 17, 2015. Dr. Neckrysh opined that the "MRI looks good" with "no concerning findings on the MRI." However, based on plaintiff's subjective complaints, Dr. Neckrysh advised him that he should no longer work as a firefighter. The Board concluded that "the preexisting lumbar findings, the lack of reporting, and the unchanged MRI findings, support[] Dr. Graf's conclusion that [plaintiff's] condition is unrelated to any act of duty or the cumulative effects of acts of duty." All four Board members approved the written order. Per statute, three members constitute a quorum necessary for the Board to adopt a motion. See 5 ILCS 120/1.02 (West 2016). The trial court affirmed the Board's determination and plaintiff filed this appeal.

¶ 45 ANALYSIS

¶ 46 Judicial review of pension board determinations is governed by Administrative Review Law. 40 ILCS 5/3-148 (West 2016). Therefore, we review the decision of the Board, not the trial court's determination. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2006). Our review in administrative cases "extends to all questions of fact and law presented by the entire record." *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007). Whether the evidence supports the Board's denial of a disability pension is a question of fact, and we reverse the Board's findings of fact only if they are against the manifest weight of the evidence. *Marconi*, 225 Ill. 2d at 534. "An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992).

¶ 47 A firefighter is entitled to a line-of-duty disability pension if, "as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty or from the cumulative effects of acts of duty, [he] is found *** to be physically or mentally permanently disabled for service in the fire department." 40 ILCS 5/4-110 (West 2016). The disability must be established by three physicians selected by the Board to examine the applicant, as well as any evidence the Board deems necessary. *Id.* at 4-112. All three physicians need not agree on the existence of a disability, or the nature and extent of a disability, for a pension to be paid. *Id.*

¶ 48 It is well-established that in order to obtain a line-of-duty disability benefit, plaintiff "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). A plaintiff must only show that his duty-related injury "is a causative factor contributing" to his disability. *Id.* In fact, "a disability pension may be based upon the

line-of-duty aggravation of a preexisting physical condition." *Wade*, 226 Ill. 2d at 505. While plaintiff is not required to show that the duty-related incident is the primary cause of his injury, there must exist "'a sufficient nexus between the injury and the performance of the duty.'" *Id.* (quoting *Barber v. Board of Trustees of the Village of South Barrington Police Pension Fund*, 256 Ill. App. 3d 814, 818 (1993).

¶ 49 Here, the parties agree that plaintiff has a preexisting condition, is permanently disabled, and can no longer perform his duties as a firefighter. Plaintiff contends that his work-related duties, or the cumulative effects of those duties, contributed to his disability. The Board, however, denied his application because it found that plaintiff's preexisting condition was the sole cause of his disability. If the record contains evidence supporting the Board's determination, we must affirm. See *Marconi*, 225 Ill. 2d at 540 (affirming the Board's decision where the record contains evidence supporting that decision).

¶ 50 The Board credited the opinions of Dr. Pelinkovic and Dr. Gleason in finding that plaintiff is disabled. In their reports, both physicians noted plaintiff's preexisting condition, his surgery, and the fact that he was able to return to full, unrestricted duty in July 2015. They also noted that plaintiff's MRIs showed post-operative changes, but no dislocation or disk herniation and "overall good alignment."

¶ 51 Both physicians also discussed the heavy physical labor involved in plaintiff's duties as a firefighter, and how that factor contributed to his disability. Dr. Pelinkovic stated that plaintiff is permanently disabled because he can no longer lift, twist, bend, or stand for prolonged periods and physical therapy would not improve his condition. He opined that plaintiff's lifting and extricating of accident victims "could have aggravated and exacerbated new pain in the lumbar spine in the area where he has a partial union and fusion" from the surgery. Dr. Pelinkovic

concluded that the surgery and October 21, 2015, incident rendered plaintiff disabled. He believed plaintiff could "perform in a light duty capacity" lifting no more than 10 pounds.

¶ 52 Dr. Gleason concluded "to a reasonable degree of certainty" that plaintiff's disability was caused by the incident on October 21, 2015. He opined that plaintiff's condition is to be expected from one who had undergone lumbar surgery, given the "physical demands of a fire fighter, a very heavy physical demand level occupation." He believed that the extrication and lifting of victims as plaintiff performed on October 21, 2015, was "consistent with an aggravation of a pre-existing condition," and the cumulative effects of these acts of fire fighting contributed to his disability. He found that plaintiff could perform "a light to medium level" of physical activity.

¶ 53 Although the Board agreed with Dr. Pelinkovic and Dr. Gleason that plaintiff was permanently disabled, it disagreed with their determination that the October 21, 2015, incident, or the cumulative effects of acts of fire fighting, contributed to his disability. Instead, they credited Dr. Graf's opinion that plaintiff's condition is solely the result of his preexisting lower back issues.

¶ 54 Dr. Graf's report stated that plaintiff suffered from "preexisting lumbar spondylosis" and the surgery he had was related to his preexisting condition, not to his work activities. Dr. Graf's findings in his report indicated that he did not believe plaintiff was experiencing debilitating pain. He found that plaintiff could "easily accomplish the entire physical examination" that was administered. Also, plaintiff "claims that while his pain is a 5/10, he further rates himself into the 'severe disability' self-rated category though it should be noted that he takes no pain medications." Dr. Graf's opinion was supported by the fact that after surgery plaintiff was able to return to full unrestricted duty and the MRIs showed no changes in plaintiff's spine after the October 21, 2015, incident that could account for his pain. As a result, Dr. Graf concluded that

plaintiff's "current condition is not disabling in nature and would not preclude him from performing full and unrestricted firefighting duties."

¶ 55 Dr. Graf gave no opinion on whether an act of duty or the cumulative effects of acts of duty contributed to plaintiff's disability because he did not find plaintiff disabled. When asked whether an act of firefighting duty exacerbated plaintiff's preexisting condition, he reiterated that plaintiff's condition "bears no relation to any work related incident" and pointed to the unchanged MRI findings as support. Nowhere in his answers did Dr. Graf incorporate plaintiff's performance of heavy physical labor into his findings, as did the other physicians. The material issue here is whether "the performance of an act of duty or from the cumulative effects of acts of duty" had a causative effect on plaintiff's condition. 40 ILCS 5/4-110 (West 2016); *Luchesi*, 333 Ill. App. 3d at 550. Dr. Graf's decision to place great weight on plaintiff's MRIs, with no consideration of whether plaintiff's extrication of a victim weighing over 300 pounds and another over 200 pounds could have aggravated his preexisting condition, renders his opinion unreliable.

¶ 56 Dr. Graf's selective regard of the record is further shown by his disbelief that plaintiff is severely disabled because "he takes no pain medications." However, his 40-plus page report, which primarily consisted of plaintiff's extensive medical history, recited the notes of Dr. Bonk indicating that plaintiff was taken off pain relieving medications because he developed elevated liver enzymes. Plaintiff stopped taking medications not because he felt no pain, but because it was dangerous for him to keep taking them. Dr. Graf believed, based on the MRIs and the fact plaintiff is not taking pain medications, that plaintiff could return to full and unrestricted duty as a firefighter. Based on a more complete view of plaintiff's records, the other doctors found that after the October 21, 2015, incident plaintiff could only perform light or medium duty work, with

lifting no more than 10-20 pounds. We find that the Board erred in assigning greater weight to Dr. Graf's opinion where he selectively regarded or failed to consider relevant evidence in the case. *Wade*, 226 Ill. 2d at 506-07.

¶ 57 Furthermore, the Board's finding that plaintiff was disabled, but his acts of duty did not contribute to his disability, is not supported in the record. The Board emphasized the MRIs and Dr. Graf's opinion in finding that plaintiff's condition was unrelated to his acts of duty. Those MRI's and other imaging studies, however, led Dr. Graf to find that plaintiff was not disabled. No report from any physician concluded, as did the Board, that plaintiff's disability was unrelated to his work-related duties. Rather, the two physicians the Board credited in finding plaintiff disabled based their determinations on his performance of acts of firefighting duty. Significantly, they also noted the same unchanged MRIs. However, Dr. Pelinkovic and Dr. Gleason took into account the very heavy physical demands of plaintiff's profession and noted plaintiff's work extricating and lifting accident victims from their vehicles during his 18 years as a firefighter. While plaintiff had a preexisting condition, and his surgery may have addressed this condition, both doctors agreed that plaintiff aggravated or exacerbated his preexisting condition when he extricated the victims on October 21, 2015, and the cumulative effects of acts of fire fighting contributed to his disability. Plaintiff's treating physician, Dr. Neckrysh, came to the same conclusion. The evidence as a whole supports the finding that plaintiff's disability resulted from the line-of-duty aggravation of his preexisting condition, notwithstanding the unchanged MRIs. The Board's determination to the contrary is against the manifest weight of the evidence. *Bowlin v. Murphysboro Firefighters Pension Board of Trustees*, 368 Ill. App. 3d 205, 211-12 (2006).

¶ 58 The cases cited by the Board as support are distinguishable. In *Marconi* and *Turcol v. Pension Board of Trustees of Matteson Police Pension Fund*, 359 Ill. App 3d 795 (2005), the Board's finding that the plaintiff was not disabled was affirmed where the record contained conflicting medical evidence and none of the physician's reports were found to be unreliable. The courts held that as the fact finder, the Board's determination should be affirmed as long as the record contains evidence to support it. *Marconi*, 225 Ill. 2d at 540; *Turcol*, 359 Ill. App. 3d at 801-02. In *Carrillo v. Park Ridge Firefighters' Pension Fund*, 2014 Il App (1st) 130656, the plaintiff continued to work for five years after the injury she claimed contributed to her disability. She recalled responding to a fire, putting on her gear and walking towards the scene for half a block when she felt pain. "She stated that she did not experience any specific injury on that date; rather, that was the point where her ongoing symptoms became intolerable." *Id.* ¶¶ 10-11. Unlike the plaintiff in *Carrillo*, plaintiff here experienced a specific, disabling injury in performing his firefighting duties when he extricated three victims on October 21, 2015. He never returned to firefighting duties after that date.

¶ 59 While our review of the Board's determination is under the manifest weight of the evidence standard, our deference is not boundless. *Id.* at 507. "A reviewing court will not hesitate to grant relief where the record does not show evidentiary support for the agency's determination." *Bowlin*, 368 Ill. App. 3d at 212. Nothing in the record supports the Board's determination that plaintiff is disabled, but his disability is unrelated to his work as a firefighter. Therefore, we reverse the Board's decision denying plaintiff's application for line-of-duty pension benefits, and remand with directions to grant the application in accordance with the Code. See *Scepurek v. Board of Trustees of Northbrook Firefighters' Pension Fund*, 2014 IL App (1st) 131066, ¶¶ 29-30 (reversing the Board's determination to deny plaintiff's application

for duty-related disability benefits where there was no basis in the record to support it); *Wade*, 226 Ill. 2d at 514 (where the Board's determination was against the manifest weight of the evidence, the court reversed and remanded with directions to grant the application).

¶ 60 Due to our disposition of plaintiff's appeal, we need not consider his due process argument. See *In re E.H.*, 224 Ill. 2d 172, 181-82 (2006) (finding that the appellate court should address constitutional issues only if necessary to decide the case).

¶ 61 Reversed and remanded with directions.