No. 2—10—0897
Order filed June 29, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THOMAS S. KINNEY, Plaintiff-Appellant, v. THE BOARD OF TRUSTEES OF THE AURORA POLICE PENSION FUND, DANIEL HOFFMAN, as President of the Board of Trustees of the Aurora Police Pension Fund, and JAMES BROWN, as Secretary of the Board of Trustees of the Aurora Police Pension Fund, Defendants-Appellees.	)	Appeal from the Circuit Court of Kane County. No. 09—MR—557 Honorable Michael J. Colwell, Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: The Board's ruling that plaintiff was not disabled from serving as a police officer, and thus was not entitled to a line-of-duty disability pension, was not against the manifest weight of the evidence, as the evidence on the question of plaintiff's disability was in conflict.

Plaintiff, Thomas S. Kinney, appeals from an order of the of the circuit court of Kane County affirming the decision of the Board of Trustees (Board) of the Aurora Police Pension Fund denying his application for a line-of-duty disability pension. We affirm.

Plaintiff joined the Aurora police department late in 1994. He applied for a disability pension in November 2008, after almost 14 years of service with the department. At that time he was assigned to duty as a police patrolman. The City of Aurora's written description of the duties of a police patrolman (which was admitted into evidence at the Board's hearing on plaintiff's application) indicates that the assignment "[r]equires the physical ability necessary to pursue and restrain suspects, overcome passive and active physical resistance and perform forcible arrest, survey crime scenes, walk patrol areas, move heavy objects, operate a vehicle at safe rates of speed in extreme weather conditions, scale objects and endure the fatigue of long hours of work with irregular breaks." According to the job description, "[d]uring the course of a patrolman's shift, he may be required to physically break up fights, or have to struggle to gain control and handcuff a suspect, push broken down vehicles out of the street, run up a flight of stairs to assist someone, chase a suspect through backyards, over fences, pursue a fleeing suspect with his squad car, and make emergency runs with the squad which can create strain, tension, and stress on the body system."

At the hearing on his application, plaintiff testified that, while he was on duty at Aurora West High School on March 7, 2008, he was called upon to break up a fight in the cafeteria between two heavyset females. While doing so, he slipped on some coffee and fell to the floor. Plaintiff landed on one of the females, and the other female "pounced" on plaintiff's back. As a result, plaintiff, who is left-handed, sustained a fracture of one of the bones of his right shoulder—the scapula. The fracture was repaired surgically with the insertion of a metal plate. Plaintiff testified that he had

participated in physical therapy, but that, with respect to external rotation of the shoulder, the strength was "not coming back." He also explained that he experienced weakness when lifting his right arm away from his side. Noting that his 13-year-old son was capable of making his arm "collapse," plaintiff voiced doubt about his ability to defend himself at "odd angles" and expressed concern that, as a result, his presence on the police force as a patrol officer might endanger civilians and fellow officers. Plaintiff testified that the strength testing conducted as part of a functional capacity assessment did not correlate with what police officers are required to do on the job. Plaintiff explained that before the injury he engaged in serious weight training and "had a plus 400 bench." He testified that after the accident he "rarely get[s] heavy with it, and 'heavy' being 50 pound dumbbells." He also recounted a recent incident in which he attempted to jump over a fence to retrieve a baseball but almost got stuck on the fence because his right arm would not allow him to push himself over the fence. Subsequent to the accident, plaintiff's leisure activities included baseball and hunting (both with a shotgun and with a bow).

Documentary evidence admitted at the hearing included hospital records detailing plaintiff's treatment for his fractured scapula and for a number of prior injuries he had sustained since 1995, including, *inter alia*, pelvis fractures, a fractured vertebra, and bilateral knee, ankle, wrist, and rotator cuff injuries. The records of plaintiff's treating physician, Steven C. Chudik, were also admitted into evidence, as were reports prepared by three board-certified orthopedic surgeons—William C. Malik, Thomas F. Gleason, and Charles W. Mercier—who were selected by the Board to examine plaintiff.

Dr. Chudik treated plaintiff's fractured scapula, as well as prior knee and rotator cuff injuries. Dr. Chudik's records include a report of a functional capacity assessment performed by plaintiff's physical therapist on October 22, 2008. The cover letter accompanying the report states:

"[Plaintiff] demonstrated his functional capabilities at the VERY HEAVY Physical Demand Level during the assessment. This means he is occasionally capable of lifting in excess of 105 lbs. ***

Per his job description, [plaintiff] is employed as a Police Officer. Although the job description does not give specific weight requirements, this is typically a MEDIUM Physical Demand Level position (50 lbs, occasional basis) Per the U.S. Department of Labor's Dictionary of Occupational Titles. At this time, [plaintiff's] capabilities do meet and surpass this level."

The three physicians selected by the Board to examine plaintiff—Drs. Gleason, Malik, and Mercier—noted in their reports that plaintiff's medical history included pelvic fractures, a fractured vertebra, and a torn left rotator cuff. Drs. Malik and Mercier also noted that plaintiff had a history of knee injuries. Dr. Gleason indicated in his report that he reviewed the job requirements for a patrol officer.

Dr. Malik found that plaintiff had a full range of motion in his shoulder but exhibited atrophy of the supraspinatus and infraspinatus muscles, which was "consistent with weakness to extreme external rotation." Dr. Malik concluded that "a permanent disability exists in [plaintiff] that prevents him from full duties [*sic*] at the Police Department." In contrast, both Drs. Gleason and Mercier concluded that plaintiff was not disabled. Dr. Gleason conducted strength testing, and assigned plaintiff a grade of "5" (on a scale of 1 to 5) for the abductors, flexors, and extensors in both shoulders. According to Dr. Gleason's report, plaintiff exhibited the same range of motion in each shoulder and radiologic studies showed that the fracture to plaintiff's scapula had healed well and that there was no evidence of dislocation. Dr. Gleason also stressed that, during the functional

capacity assessment, plaintiff "demonstrated his functional capabilities at the very heavy physical demand level." Dr. Mercier noted that plaintiff exhibited normal muscle strength of the deltoids, normal periscapular muscles, and a full range of motion of the right shoulder.

The Board found that plaintiff's injury resulted from the performance of an act of duty but that the injury did not disable him from performing the duties of a police officer.

In an appeal from a judgment in an administrative review proceeding, the appellate court reviews the administrative agency's decision, not the trial court's. *Harroun v. Addison Police Pension Board*, 372 Ill. App. 3d 260, 261-62 (2007). Although the agency's rulings on questions of law are reviewed *de novo*, findings of fact will be disturbed only if they are against the manifest weight of the evidence. *Id.* at 262. " 'An administrative agency decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident.' " *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007) (quoting *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992)). An administrative agency's decision on a mixed question of fact and law will be upheld unless clearly erroneous. *Harroun*, 372 Ill. App. 3d at 262. "A mixed question exists where the historical facts are admitted or established, the rule of law is undisputed, and the only issue is whether the facts satisfy the settled statutory standard." *Dowrick v. Village of Downers Grove*, 362 Ill. App. 3d 512, 515 (2005).

Section 3—114.1(a) of the Illinois Pension Code (Code) provides, in pertinent part:

> "If a police officer as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty, is found to be physically or mentally disabled for service in the police department, so as to render necessary his or her suspension or retirement from the police service, the police officer shall be entitled to a disability retirement pension equal

to *** 65% of the salary attached to the rank on the police force held by the officer at the date of suspension of duty or retirement ***." 40 ILCS 5/3—114.1(a) (West 2008).

As noted, the Board found that, although the injury to plaintiff's shoulder resulted from the performance of an act of duty, plaintiff was not disabled from service in the police department as a result of that injury. Whether the evidence supports this decision is a question of fact subject to review under the manifest-weight standard. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 534 (2006). "In examining an administrative agency's factual findings, a reviewing court does not weigh the evidence or substitute its judgment for that of an administrative agency." *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 204 (1998).

In this case there was conflicting evidence on the question of whether plaintiff was disabled from serving as a police officer. One of the three physicians selected by the Board to examine plaintiff, Dr. Malik, concluded that, due to atrophy of certain shoulder muscles, plaintiff was permanently disabled from fulfilling the duties of a police officer. The other two physicians concluded that plaintiff had regained normal strength and range of motion in his shoulder and was capable of performing the duties of a police officer. It was the Board's responsibility to resolve the conflicting evidence. *Matos v. Cook County Sheriff's Merit Board*, 401 Ill. App. 3d 536, 542 (2010).

Plaintiff argues, however, that he is entitled to a disability retirement pension because the injury to his shoulder, along with prior injuries, makes it highly likely that he "will suffer another serious injury that could leave him permanently disabled." We have no quarrel with the abstract proposition that, where a sickness, an accident, or an injury leaves an officer inordinately vulnerable to serious bodily harm if he or she continues to serve as a police officer, a finding that the officer is disabled might be justified on that basis alone. However, at what point the risk of harm and the

magnitude of the threatened harm are serious enough to warrant a disability pension is essentially a question of fact for the Board. Here, the only evidence that plaintiff's shoulder injury and his prior injuries exacerbated the risk of duties as police officer was an entry in Dr. Chudik's records indicating that "[plaintiff] has [*sic*] at a point now with these several injuries, in particular with just even [the shoulder injury] alone, where he has some limitations that it would be unsafe for him to return to a situation where he was required to continue to undergo potential physical altercations with criminals and it has even potentially life-threatening potential consequences." Dr. Chudik did not indicate whether plaintiff was at increased risk of any particular injury. Other than noting that plaintiff had valid concerns about using his right hand to fend someone off while holding a gun in his left hand, Dr. Chudik did not identify any specific physical limitations that would prevent plaintiff from defending himself in a violent confrontation. As the Board noted in its written decision, police work is inherently dangerous and unpredictable. The Board was not obliged to award plaintiff a disability pension based on Dr. Chudik's generally amorphous concerns about unspecified future injuries.

Plaintiff contends that, in reaching its decision to deny his application, the Board labored under the erroneous view that a disability pension is available only when a police officer has suffered a life-threatening injury. Although the Board briefly observed in its written decision that plaintiff had not suffered such an injury, the decision in no way suggests that the Board assigned controlling weight to this consideration. Rather, it is clear that the Board denied plaintiff''s application not because his shoulder injury was not life-threatening, but because the Board concluded that the injury did not prevent plaintiff from fulfilling the duties of a police officer.

Plaintiff also argues that the Board ignored his testimony regarding the weakness in his shoulder and his belief that he could not defend himself or others if faced with a violent situation. The Board specifically noted plaintiff's testimony regarding weakness in his shoulder. However, plaintiff's testimony indicates that he was exceptionally strong prior to the accident, having the ability to bench-press over 400 pounds. The Board reasonably concluded that plaintiff's "inability to achieve his pre-level strength and physical threshold is not reason alone to establish disability." In addition, although plaintiff's perception of weakness finds support in Dr. Malik's report, Dr. Mercier concluded that plaintiff's shoulder strength was normal, Dr. Gleason assigned a grade of "5" (on a scale of 1 to 5) for the abductors, flexors, and extensors in both of plaintiff's shoulders, and the functional capacity assessment indicated that plaintiff "demonstrated his functional capabilities at the VERY HEAVY Physical Demand Level."

Plaintiff also asserts that the Board did not consider that his job description indicates that officers may have to break up fights, struggle to subdue suspects, and chase suspects over fences. The argument simply has no basis in the record of the proceedings before the Board, and it is fatuous to suggest that the Board was incognizant of these basic demands of police work (accord *Sanders v. Board of Trustees of the City of Springfield Police Pension Fund*, 112 Ill. App. 3d 1087, 1091-92 (1983) ("In view of their personal knowledge of the peculiar physical and emotional demands of the policeman's job, the members of the boards of trustees of policemen's pension funds, the majority of whom are either active or retired police officers themselves, are obviously in the best position to determine, on the basis of relevant medical data, whether applicants for membership are physically and mentally fit to perform the duties of a police officer.")).

Finally, plaintiff argues that the Code should be construed liberally in favor of pension plan participants. Because plaintiff has raised no issue as to the construction of any provision of the Code, this principle has no application here.

For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

Affirmed.