

2011 IL App (2d) 110179-U
No. 2-11-0179
Order filed November 10, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PETE ALMEIDA,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellant,)	
)	
v.)	No. 10-MR-322
)	
BOARD OF TRUSTEES OF THE ELGIN)	
POLICE PENSION BOARD, JAMES E.)	
LAMKIN, President, ROBERT L. CHRIST,)	
Vice President, CHRIS TROIOLA, Secretary,)	
JAMES R. ROSCHER, Assistant Secretary,)	
and ROBERT C. O'CONNOR, Trustee,)	Honorable
)	Thomas E. Mueller,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

Held: The defendant's decision to deny the plaintiff's request for a non-duty disability pension was against the manifest weight of the evidence.

¶ 1 The plaintiff, Pete Almeida, appeals from an order of the circuit court of Kane County affirming the decision of the defendant, the Board of Trustees of the Elgin Police Pension Board (Board), denying his application for a non-duty disability pension. We reverse.

¶ 2

I. BACKGROUND

¶ 3 The plaintiff became a member of the Elgin police department in July 1990. On May 15, 2009, the plaintiff filed an application with the Elgin Police Pension Fund, seeking a line-of-duty disability pension under section 3-114.1 of the Illinois Pension Code (Code) (40 ILCS 5/3-114.1 (West 2008)), or, in the alternative, a non-duty disability pension pursuant to section 3-114.2 of the Code (40 ILCS 5/3-114.2 (West 2008)). The application indicated that the nature of the injury or disability was post-traumatic stress dating back to May 26, 2006. On June 1, 2009, the plaintiff was terminated from his employment with the Elgin police department. The Board held hearings on the plaintiff's application over two days and received numerous exhibits into evidence.

¶ 4 Pursuant to section 3-115 of the Code (40 ILCS 5/3-115 (West 2008)), the plaintiff was examined by three physicians, all psychiatrists, chosen by the Board. Although none of the physicians testified at the hearings, each physician completed a certificate of disability and rendered a written opinion. The physicians were Dr. Richard Harris, Dr. Linda Gruenberg, and Dr. Alexander Obolsky. Dr. Harris certified the plaintiff as permanently disabled from police work. Dr. Gruenberg certified the plaintiff as "presently" disabled from police service. Dr. Obolsky found that the plaintiff was not permanently disabled from police service.

¶ 5 In his written report, Dr. Harris indicated that he evaluated the plaintiff on October 20, 2009. He interviewed the plaintiff for 90 minutes. In addition, Dr. Harris reviewed the plaintiff's medical records from the plaintiff's treating physician (Dr. Steven Best), the Elgin police personnel records, and the plaintiff's performance evaluations. Dr. Harris concluded that the plaintiff was suffering from depression and anxiety, but that his problems could be treated. Dr. Harris noted:

"During much of the time that [the plaintiff] was experiencing significant psychological distress he was not in active treatment. He was taking medication but medication alone

is not sufficient treatment for the problems that he has had. [The plaintiff] had also been on a psycho-stimulant for these years and this may have also contributed to his irritability. I believe he needs psychotherapy in order to address the significant interpersonal problems that interfered with his work performance and also likely in his marriage.

[The plaintiff] does have a psychiatric impairment that is causing significant limitation of function and specifically disability in performance of his police duties. The cause of the disability is non-duty related.”

¶ 6 Dr. Gruenberg’s written report indicated that she evaluated the defendant for three and a half hours on December 14, 2009. Dr. Gruenberg also reviewed the following records: results of the plaintiff’s forensic psychological tests; the plaintiff’s “Brain SPECT” report; the plaintiff’s prescriptions; Dr. Best’s medical records on the plaintiff; the plaintiff’s personnel records; and the plaintiff’s performance reviews. Dr. Gruenberg also conducted telephone interviews with Chief Womak, Deputy Chief Beeter, and Lieutenant Wolf of the Elgin police department. Dr. Gruenberg concluded that the plaintiff suffered from recurrent major depression, attention deficit disorder, headaches, occupational problems, financial problems and domestic problems. Dr. Gruenberg found that the plaintiff’s condition could improve with the appropriate medication and therapy. She further found that the plaintiff’s psychiatric condition had “caused significant difficulties in performing the duties required of him as a sergeant and could cause difficulties in performing the duties of a police officer.” In conclusion, Dr. Gruenberg wrote:

“It is concluded that [the plaintiff] is disabled due to his attention deficit disorder and recurrent major depression as a police officer or police sergeant and cannot perform the assigned duties of these positions. This is not a duty-related disability.

It is recommended that [the plaintiff] receive psychopharmacologic management and psychotherapy so that he may recover from his current disability.”

¶ 7 In his written report, Dr. Obolsky indicated that he evaluated the plaintiff on November 20, 2009. In addition, Dr. Obolsky reviewed the plaintiff’s medical records, disciplinary records, performance evaluations, prescriptions, and the results of forensic psychological tests. Dr. Obolsky concluded that the plaintiff suffered from anxiety and personality disorders; however, the plaintiff’s disorders were not duty-related. The plaintiff’s anxiety waxed and waned over time. When his anxiety was high, the plaintiff suffered physical symptoms such as gastrointestinal upset, headache, fatigue, sleep disturbances, and concentration and memory problems. The plaintiff’s promotion to sergeant caused an increase in his anxiety that lasted throughout the time he worked as a sergeant. Dr. Obolsky noted that the plaintiff produced invalid test results on several forensic psychological tests. Dr. Obolsky found that the invalid results indicated “an attempt on [the plaintiff’s] part to present with memory difficulties that are not judged to be genuine.” Dr. Obolsky also concluded that the plaintiff’s “pattern of performance on tests of emotional and personality functioning raised questions about the validity of his current symptom presentation.” Finally, Dr. Obolsky stated:

“It is my opinion, held with a reasonable degree of medical psychiatric certainty, that [the plaintiff’s] identified mental disorders have a good prognosis for improvement with appropriate cognitive psychotherapy augmented with judicious use of psychiatric medications.”

¶ 8 Dr. Lisa Bailey, a licensed clinical psychologist, administered various forensic psychological tests to the plaintiff. She evaluated the plaintiff on October 27 and November 20, 2009. Dr. Bailey reached the following conclusions with a reasonable degree of psychological certainty. Dr. Bailey found that the plaintiff’s “pattern of performance on tests of emotional and personality functioning

raise[d] questions about the validity of his current symptom presentation.” Nonetheless, she found that tests for personality and emotional function indicated that the plaintiff experienced long-standing symptoms of depression and anxiety. She concluded that the test results did not support “the presence [of] psychological concerns or neurocognitive impairments resulting from exposure to a traumatic event.”

¶ 9 At the hearing, the plaintiff testified that he started working as a patrol officer for the Elgin police department in July 1990. He was required to and passed physical and psychological tests prior to being hired. He had occasional disciplinary issues while he was a patrol officer. In 1990, he received a three-day suspension for inappropriate display of a handgun. In 1998, he received a one-day suspension for insubordination. In 2004, he missed “detail” and received a letter of reprimand. In 2005, he received a letter of reprimand for inappropriate conduct. The corresponding disciplinary records were submitted into evidence.

¶ 10 On January 6, 2006, he was promoted to the rank of sergeant. To be promoted, he had to take a written test, give an oral interview, and participate in assessment testing by independent assessors (people of rank from other police departments). He scored the highest of all the candidates on the assessment testing. The duties and responsibilities of a sergeant are to supervise patrol officers. The plaintiff testified that being a sergeant was stressful and he often second-guessed his decisions because he was worried about how other supervisors would react. He experienced occasional personality clashes with the patrol officers he was supervising.

¶ 11 The plaintiff further testified that he informed the Board-appointed physicians that he experienced a traumatic event on May 26, 2006. On that date, there was a fatal car crash involving a four-year old girl. He was called to the scene. When he arrived, the young girl had already died. He had an emotional breakdown on that day because he had a daughter about the same age with

characteristics similar to the deceased girl. The plaintiff's recollection was that the Board-appointed physicians did not believe this traumatic event had any bearing on his mental disability. He experienced other traumatic incidents such as fatal shootings and a criminal sexual assault of a six-year old. He did, at various times, try to let people in administration and other sergeants know that he was struggling with various issues. In his assessment, the chief of police believed in progressive discipline and was not into seeking counseling for the plaintiff or any other officer.

¶ 12 The plaintiff started seeing Dr. Best in 2003, for marriage counseling. Dr. Best determined that there were other issues with the plaintiff that needed to be evaluated. Dr. Best asked the plaintiff to take a "Brain SPECT," which was essentially an imaging of his brain. (The record reveals that the study was conducted on November 21, 2003.) Based on those results, Dr. Best concluded that the plaintiff suffered from depression and attention memory defects. The plaintiff testified that he had memory problems as a sergeant. He couldn't remember conversations or details. In addition, he had problems filling out paperwork and dealing with things.

¶ 13 In 2009, Dr. Best told the plaintiff that it was best not to return to work. Dr. Best provided a doctor's note to the police department, dated May 1, 2009, that indicated the plaintiff was unable to function as a police officer. The letter was admitted as an exhibit. Thereafter, the plaintiff stopped going to work. The plaintiff testified that in 2004 or 2005, he started taking Trileptal for brain and impulsivity issues; Effexor for depression; and Focalin for attention and problems focusing on details. The plaintiff testified that he was not fit to do police work. He considered himself mentally disabled.

¶ 14 On cross-examination, the plaintiff testified that most of his problems were worse after he was promoted to sergeant. It was a difficult transition. He did not receive support from other sergeants because he had personal issues with many of them. Being a sergeant required a lot more

paperwork and there were many new procedures to learn. The plaintiff acknowledged that he made errors on his timesheets, but he insisted that the errors were unintentional. The plaintiff also acknowledged that around April 2009, the police chief offered to have him demoted back to a patrol officer. He did not accept the offer. Most people who were demoted had the option of retesting and becoming a sergeant again in the future. However, he was told that if he accepted demotion, he would never be able to apply for a sergeant position again with the Elgin police department. The plaintiff testified that even if he had accepted the demotion, he was not able to act as a patrol officer because he was nervous about making the wrong decisions and he would second-guess his decisions.

¶ 15 Disciplinary records submitted into evidence indicated that, on September 16, 2006, after his promotion to sergeant, the plaintiff received a letter of reprimand for engaging in an argument with a subordinate member of the police department and reprimanding that member in front of others in the department. On January 24, 2007, the plaintiff received a three-day suspension for improperly filling out timesheets and not turning in timesheets on time. In April 2007, the plaintiff received a letter of reprimand for violation of department rules on general conduct because he, while off duty, and later, while on duty, went to a barbershop and argued with a citizen over the scheduling of a haircut.

¶ 16 In May 2008, the plaintiff received a five-day suspension for three incidents and was ordered to participate in the employee assistance program. The three incidents were as follows: (1) while off duty, the plaintiff argued with a former girlfriend and placed her arm behind her back; (2) while on duty, the plaintiff argued with a former girlfriend and when she tried to exit, he forced the door closed, preventing her exit; and (3) the plaintiff arrived at an 8 a.m. scheduled training session at about 1 p.m. and was unprofessional and discourteous when he was told he would have to attend a

different training session. The plaintiff's scheduled suspension dates were May 8, 9, 12, 13 and 27, 2008.

¶ 17 On August 14, 2008, the plaintiff received a 30-day suspension because he reported for duty on May 9, a previously scheduled day of suspension. He also reported for duty on May 13, but was sent home and told he had to serve his remaining suspension days consecutively. The plaintiff told the chief of police that he had received permission to change his suspension day. Following an investigation, the chief of police concluded that the plaintiff had not been given such permission and that he was being untruthful. Meeting notes indicated that the police chief gave the plaintiff two options: (1) take a demotion from his position as sergeant with no suspension or (2) take a 30-day suspension without demotion. If the latter were chosen, a performance improvement plan was to be instituted in conjunction with the suspension. The plaintiff asked the chief to reconsider as he did not like either option. The plaintiff was subsequently ordered to take a 30-day suspension and a performance improvement plan was established.

¶ 18 In October 2008, the plaintiff returned as sergeant following his 30-day suspension. Shortly thereafter, the plaintiff was charged with additional violations. The chief of police found that the plaintiff had violated the police department's rules and regulations by: (1) changing his scheduled days off in violation of a standing order that he was not allowed to do so without specific permission; (2) submitting an inaccurate time-sheet on October 23, 2008; (3) taking a day off on two separate occasions without appropriate authorization and without notifying the department of illness or other emergency; and (4) failing to take appropriate supervisory action, on October 8, 2008, during a subordinate's investigation of a case concerning the serious physical abuse of a child. Based on the foregoing conduct, the chief of police terminated the plaintiff's employment with the Elgin police department on June 1, 2009.

¶ 19 On April 22, 2010, the Board voted to deny the plaintiff both a duty and a non-duty related pension. The Board subsequently issued a written order and decision. The Board found that the defendant suffered from anxiety and depression but noted that these impairments could be treated. The Board found that the plaintiff was able to perform his job duties until he was promoted to sergeant. The chief of police offered to return the plaintiff to his patrol duties, but the applicant refused the offer and was subsequently terminated. The Board concluded that the plaintiff would have been able to perform his duties as a police officer had he taken the demotion. The Board noted that the Board-retained physicians disagreed as to the nature and extent of the plaintiff's impairments; however, they all agreed that his impairments were treatable and not permanent. The Board concluded that the plaintiff was not psychologically disabled and that any psychological problems were not duty-related.

¶ 20 On December 10, 2009, the plaintiff filed a complaint for administrative review in the circuit court, and on November 4, 2010, the trial court affirmed the Board's decision. The plaintiff then filed a timely notice of appeal.

¶ 21 II. ANALYSIS

¶ 22 On appeal, the plaintiff argues that the Board's decision denying his application for a non-duty disability pension, under section 3-114.2 of the Code (40 ILCS 5/3-114.2 (West 2008)), was against the manifest weight of the evidence. Section 3-114.2 provides for a non-duty disability pension if a police officer "becomes disabled as a result of any cause other than the performance of an act of duty, and who is found to be physically or mentally disabled so as to render necessary his or her suspension or retirement from police service."

¶ 23 On appeal from a judgment in an administrative review proceeding, we review the decision of the administrative agency, not the trial court's decision. *Lindemulder v. Board of Trustees of the*

Naperville Firefighters' Pension Fund, 408 Ill. App. 3d 494, 500 (2011). The parties agree that whether the plaintiff was entitled to a non-duty disability pension is a question of fact, reviewed under a manifest weight of the evidence standard. See *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 532 (2007). “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). Therefore, the “mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings.” *Id.* A reviewing court should not substitute its judgment for that of an administrative agency. *Id.* If the record contains evidence to support the agency’s decision, that decision should be affirmed. *Id.*

¶ 24 After considering the entirety of the evidence, we conclude that the Board’s decision was against the manifest weight of the evidence. Three of the four physicians that evaluated the plaintiff determined that the plaintiff was disabled from his duties as a police officer. The plaintiff’s treating physician, Dr. Best, concluded on May 1, 2009, shortly before the plaintiff applied for a disability pension, that the plaintiff was not functioning well, was experiencing post-traumatic stress disorder, and that he should not work as a police officer “for the time being.” Two Board-appointed physicians agreed that the plaintiff was disabled. Dr. Harris certified the plaintiff as permanently disabled from police work. Dr. Harris found that the plaintiff had a psychiatric impairment that was causing disability in the performance of his police duties. Dr. Gruenberg certified the plaintiff as “presently” disabled from police service. Dr. Gruenberg concluded that the plaintiff was disabled due to his attention deficit disorder and recurrent major depression and that he could not perform the duties of either a police sergeant or a police officer. Drs. Harris and Gruenberg agreed that the plaintiff’s conditions could be treated and that he could recover.

¶25 We acknowledge that Dr. Obolsky found that the plaintiff was not permanently disabled from police service. Nonetheless, Dr. Obolsky found that the plaintiff suffered from anxiety and personality disorders. Dr. Obolsky noted that when the plaintiff had high levels of anxiety, he suffered physical symptoms including concentration and memory problems. Dr. Obolsky concluded that the plaintiff's mental disorders could improve with psychotherapy and the judicious use of psychiatric medications. Accordingly, although Dr. Obolsky found that the plaintiff was not permanently disabled, he also found that the plaintiff had mental disorders that needed treatment. On the basis of the record before us, the Board's finding that the plaintiff was not disabled was contrary to the manifest weight of the evidence. See *Batka v. Board of Trustees of the Village of Orland Park Police Pension Fund*, 186 Ill. App. 3d 715, 723 (1989) (the appellate court found that a pension board's decision, denying a non-duty disability pension, was against the manifest weight of the evidence where three psychiatrists found that the plaintiff was disabled, one psychiatrist found that although he was fit for duty he needed "fairly intensive psychotherapy," and two psychologists found that he was fit for duty if he continued his therapy); *Hahn v. Police Pension Fund of the City of Woodstock*, 138 Ill. App. 3d 206, 211 (1985) (the appellate court, reversing the pension board, found that the plaintiff was entitled to a non-duty disability pension where three of the four psychiatrists who examined the plaintiff near the time of his retirement found that he was disabled).

¶26 The Board questions why the plaintiff, if he was suffering stress between 2006 and 2008, did not file for a disability pension until two weeks before his termination of employment was imminent. However, the Board fails to cite any authority indicating that the plaintiff's imminent termination precluded him from applying for a disability pension. Moreover, case law clearly holds that as long as a police officer applies for non-duty disability benefits prior to his resignation or discharge, he is not disqualified from receiving those benefits. *Pierce v. Board of Trustees of the Police Pension*

Fund of the City of Waukegan, 177 Ill. App. 3d 915, 917 (1988) (appellate court reversed Board's denial of non-duty benefits in case where police officer filed application for benefits prior to his discharge); *Hahn*, 138 Ill. App. 3d at 211 (officer who filed for benefits and then submitted resignation did not forgo benefits due to resignation).

¶ 27 The Board notes that the Board-appointed physicians did not examine the plaintiff until six months after he had applied for a disability pension and was terminated by the department. The Board argues that the plaintiff's termination contributed to his anxiety and depression. However, none of the Board-appointed physicians indicated that the plaintiff's mental illnesses were the result of his termination. Moreover, it has been held that the determination of an officer's disability should be determined as of the date of his suspension of duty or retirement. *Hahn v. Woodstock*, 138 Ill. App. 3d 206, 210 (1985). As such, even if we were to consider the timing of the evaluations, the only evaluation that existed at the time of the plaintiff's application for disability and his subsequent termination from the police departments was that of Dr. Best. In a letter dated May 1, 2009, Dr. Best stated that the plaintiff was suffering from post-traumatic stress and that he was not fit to perform his police duties. This would lend support to our determination that the Board's denial of a non-duty disability pension was against the manifest weight of the evidence.

¶ 28 Finally, the Board argues that many people suffer from anxiety and depression and continue on with their lives. The Board opines that the plaintiff was able to function as a police officer for 16 years and that if he had taken the demotion back to patrol officer and forgone his 30-day suspension, he would be working today. Again, this rationale is not supported by the evidence. All of the physicians chosen by the Board indicated that they had reviewed the plaintiff's employment and medical records. None of those physicians indicated that the plaintiff's mental illnesses would have been alleviated by accepting a demotion to patrol officer. In fact, despite being aware of the

plaintiff's opportunity to accept a demotion, Dr. Harris nonetheless concluded that the plaintiff was permanently disabled from his "police duties." Furthermore, Dr. Gruenberg concluded that the plaintiff was disabled "due to his attention deficit disorder and major depression as a police officer or police sergeant and cannot perform the duties of these positions."

¶ 29

III. CONCLUSION

¶ 30 For the foregoing reasons, we reverse the judgment of the circuit court of Kane County and order the Board to award the plaintiff the applicable non-duty disability pension.

¶ 31 Reversed.