2023 IL App (3d) 220404-U

Order filed October 16, 2023

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2023

KEITH GARDNER, Plaintiff-Appellant, v. BOARD OF TRUSTEES OF THE ILLINOIS MUNICIPAL RETIREMENT FUND; BRIAN COLLINS, in his official capacity as Executive Director of the Illinois Municipal Retirement Fund; GWEN HENRY, in her official capacity as Executive Trustee and President of the Illinois Municipal Retirement Fund; NATALIE COPPER, in her official capacity as Employee Trustee and Vice-President of the Illinois Municipal Retirement Fund; SUE STANISH, in her official capacity as Executive Trustee and Secretary of the Illinois Municipal Retirement Fund; LOUIS KOSIBA, in his official capacity as Annuitant Trustee of the Illinois Municipal Retirement Fund; TOM KUEHNE, in his official capacity as Executive Trustee of the Illinois Municipal Retirement Fund; DAVID MILLER in his official capacity as Executive Trustee of the Illinois Municipal Retirement Fund; TRACIE MITCHELL, in her official capacity as Employee Trustee of the Illinois Municipal Retirement Fund; and PETER	)	Appeal from the Circuit Court of the 18th Judicial Circuit, Du Page County, Illinois, Appeal No. 3-22-0404 Circuit No. 21-MR-1377

STEFAN in his official capacity as Employee Trustee of the Illinois Municipal Retirement Fund,	)	Honorable Craig R. Belford,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE BRENNAN delivered the judgment of the court.
Justices Albrecht and Davenport concurred in the judgment.

ORDER

¶ 1 *Held*: The IMRF Board erred in retroactively terminating claimant's temporary disability benefits. Reversed and remanded.

¶ 2 In July 2015, plaintiff-appellant, Keith Gardner, filed a claim for temporary disability benefits pursuant to section 7-146 of the Pension Code (40 ILCS 5/7-146 (West 2014)). In September 2015, defendant, the Illinois Municipal Retirement Fund (IMRF), *approved* Gardner's claim and thereafter awarded the maximum 30 monthly payments (held pending the completion of workers' compensation and social security disability cases and any potential offsets). When the temporary disability benefits were exhausted, IMRF advanced the case to consider whether Gardner qualified for total and permanent disability pursuant to section 7-150 of the Pension Code (40 ILCS 5/7-150 (West 2014)). In March 2018, an IMRF benefits manager determined that Gardner did not qualify for total and permanent disability. Gardner appealed that decision to the IMRF Board and opted to submit additional medical evidence. In the course of reviewing Gardner's total and permanent disability appeal, IRMF revisited Gardner's temporary disability benefits. It contended that it had come across new evidence: a December 2015 offer by the Kane County Sheriff's Office (Kane County) for Gardner to return to the position of patrol deputy with accommodation and Gardner's December 2015 decision to decline that offer, as summarized in a 2016 workers' compensation decision. IMRF relied upon this evidence in retroactively

terminating Gardner's temporary disability benefits to December 2015. It then determined that the original subject of the appeal before it, the denial of Gardner's total and permanent disability claim, was moot because Gardner had not exhausted the 30-month limit on temporary disability benefits. Gardner filed a complaint for administrative review, which the circuit court denied, finding that the new evidence supported IMRF's decision. For the reasons that follow, we reverse IMRF's decision to retroactively terminate Gardner's temporary disability benefits and reinstate the 30-month temporary disability award. The question of total and permanent disability is no longer moot, and we remand for IMRF to consider Gardner's appeal of its 2018 denial of that claim.

¶ 3 I. BACKGROUND

¶ 4 In 1996, Gardner began working as a patrol officer for Kane County and began participation in IMRF. In 2000, Gardner began experiencing chronic pain in his right foot and was ultimately diagnosed with Morton's Neuroma along the third/fourth and fourth/fifth metatarsal. Gardner underwent four surgical neuroma excisions, but the pain continued. In 2008, Gardner began experiencing chronic pain in his right buttocks and low back and was ultimately diagnosed with, *inter alia*, right lower back pain, chronic pain, unspecified mononeuropathy of unspecified lower limb, and benign neoplasm of peripheral nerves and automatic nervous system. Gardner had a spinal-cord stimulator implanted to control the pain. He underwent four subsequent surgeries related to the positioning of the stimulator.

¶ 5 In January 2010, while on patrol, Gardner was in a physical altercation with an offender. While wrestling with the offender, Gardner heard and felt a pop in the low right side of his back. Gardner experienced that the stimulator no longer provided relief. A worker's compensation doctor, Dr. Babek Lami, diagnosed Gardner with low back pain and strain due to the altercation.

The CT scan did not show significant pathology. Lami qualified, however, that his team was unable to obtain MRI results due to the placement of the stimulator. In February 2011, Gardner's pain management physician, Dr. Howard Konowitz, recommended that Gardner remove the stimulator as it no longer provided relief. Later, in March 2015, after the stimulator had been removed, Konowitz could see that Gardner had significant right superior gluteal nerve entrapment due to scar tissue in the area where the stimulator had been.

¶ 6 Meanwhile, in 2010 or 2011, Lami advised that Gardner could return to work with restrictions, provided he did not wear a heavy belt and vest. Between 2011 and 2014, Kane County Sheriff Patrick Perez accommodated Lami's recommended restriction and assigned Gardner as a school resource officer at Kaneland High School. In December 2014, Sheriff Perez retired, and Sheriff Donald Kramer took office. Kramer changed the uniform policy for school resource officers, requiring them to wear a full duty belt and vest. Gardner tried to wear the full duty belt and vest but experienced pain. Kane County agreed to accommodate Gardner through the remainder of the school year, at which time Gardner would be transferred back to the patrol division.

¶ 7 A: Temporary Disability Benefits: Approved

August 19, 2015, to February 28, 2018

¶ 8 On August 11, 2015, Gardner filed a claim for Temporary Disability Benefits with IMRF pursuant to section 7-146 of the Pension Code. That section provides in relevant part:

> "(a) The participating employee shall be considered temporarily disabled if:
>
> 1. *He is unable to perform the duties of any position which might reasonably be assigned to him* by his employing municipality or instrumentality thereof or

participating instrumentality due to mental or physical disability caused by bodily injury or disease ***;

2. The Board has received written certifications from at least one licensed and practicing physician and the governing body of the employing municipality or instrumentality thereof or participating instrumentality stating that the employee meets the conditions set forth in subparagraph 1 of this paragraph (a)." (Emphasis added.) 40 ILCS 5/7-146 (West 2014).

¶ 9 Gardner submitted an initial IMRF Form 5.42, "Physician's Statement Disability Claim," completed by Dr. Konowitz, certifying that Gardner was temporarily disabled. The pre-printed form, dated July 21, 2015, allowed for brief, one-word or single-sentence answers. In answer to the question whether Gardner could return to work, Konowitz checked "Yes, with restrictions." He explained in the single-line space provided: "2010 to present, modified duty belt and vest." In answer to a request for prior treatment dates, he provided: "See Records." He also provided his phone number, as he continued to do on all subsequent forms.

¶ 10 Attached medical records dated July 21, 2015, set forth the following. Regarding a March 2015 visit, Gardner experienced back pain, rating a 5 out of 10 when resting and 7 out of 10 when active. The July 21, 2015, record further noted: "[Back] pain localized over right SI. Positive exam finding. Workup and review pending. Lumber MRI degenerative changes. Full study of SI not completed. *** [T]issues *** consistent with prior surgery"; "Progressive tolerance for current pain medications is occurring. This includes decreased effectiveness *** to opioids." Regarding other recent visits, foot pain was rated as a sharp 6 to 7. As of July 21, 2015, Gardner was instructed to undergo "repeat ultrasound guided phenol injection with sedation."

¶ 11 In September 2015, IMRF, via telephone, confirmed Kane County's inability to accommodate Gardner. This conversation was documented in a September 25, 2015, e-mail reply from Kane County:

> "As we just discussed on the phone, in response to your question regarding the County's accommodation to [Gardner]; It is my understanding that the Sheriff's Office worked with Deputy Gardner to decrease the weight of his duty belt and vest prior to the June 3, 2015, date. However, it is also my understanding that after attempting to work with the lighter equipment, Deputy Gardner informed the Sheriff's Office that he was in pain and could not perform his duties."

IMRF approved Gardner's temporary disability benefits on September 25, 2015, backdated to August 19, 2015.

¶ 12 On December 4, 2015, Kane County, through lieutenant Patrick Gengler, sent Gardner a written offer to return to work as a patrol officer, with accommodation. Kane County offered a lighter gun, belt (moving certain belt equipment to a vest, cargo pants, or thigh holster), bullet-proof vest, and radio, as well as suspenders.

¶ 13 On December 18, 2015, Gardner responded in a written letter that Kane County's offer did not satisfy his restrictions and were unsafe. He noted that moving equipment from his belt to his vest would decrease weight in one area but increase it in another. He requested to return to work in any position other than patrol, where he could continue to wear the equipment that had been required of his former position as a school resource officer. He concluded: "I *am* able to wear the lightweight vest and my firearm. Please place me in a position within my restrictions and I will be a productive member of the Sheriff's Office." (Emphasis added.)

¶ 14 Kane County did not respond to Gardner's December 18, 2015, letter. IMRF continued to approve temporary disability payments, to be released upon the conclusion of Gardner's pending workers' compensation and social security disability cases should there be an offset.

¶ 15 Dr. Konowitz continued to certify Gardner's temporary disability status. The record contains nine subsequent IMRF Form 5.42 certifications. On November 10, 2015, Konowitz checked a box stating that Gardner's condition "improved." The options were recovered, improved, unimproved, or retrogressed. He again advised that Gardner could work only with restrictions, specifically, "[Illegible], restrictions related to vest and duty belt." On January 26, 2016, Konowitz maintained that Gardner could work only with restrictions, specifically: "*Related to driving* and use of duty belt and vest." (Emphasis added.) On February 9, 2016, and March 1, 2016, Konowitz checked that Gardner's condition was "unimproved." He advised work restrictions as: "[Restricted from] wearing heavy duty belt and heavy bullet proof vest. *Restricted from patrol duty*." (Emphasis added.) On April 26, 2016, Konowitz reported that Gardner's condition was "improved." He advised: "[Restricted from] wearing heavy duty belt, heavy bullet proof vest; Restricted duty." On October 18, 2016, Konowitz reported that Gardner's condition was "unimproved." He advised: "[Restricted from] wearing heavy duty belt, heavy bullet proof vest; Restricted duty." On March 7, 2017, Konowitz reported that Gardner's condition was "unimproved." Complications included: "Increased [illegible] sitting." He advised: "[Restricted from] duty belt; *prolonged sitting and standing*." (Emphasis added.) On July 11, 2017, Konowitz reported that Gardner's condition had "*retrogressed*." He wrote that restrictions were "N/A." On October 17, 2017, Konowitz again reported that Gardner's condition had "retrogressed" and that restrictions were "N/A." Gardner's medical records from Konowitz's office were consistent with Konowitz's certified recommendations. Based on these certifications, IMRF issued 30 months of

temporary disability benefits, the maximum allowed under section 7-147 of the Pension Code. 40 ILCS 5/7-147 (West 2014).

¶ 16 B. Total and Permanent Disability: Denied

March 15, 2018

¶ 17 In January 2018, IMRF advanced the case to consider whether Gardner qualified for total and permanent disability benefits pursuant to section 7-150 of the Pension Code. That section provides in relevant part:

> "(a) A participating employee shall be considered totally and permanently disabled if:
>
> 1. He is unable to engage in *any gainful activity* because of any medically determinable physical or mental impairment which can be expected to result in death or be of a long continued and indefinite duration ***;
>
> 2. The Board has received a written certification by at least 1 licensed and practicing physician ***." (Emphasis added.) 40 ILCS 5/7-150 (West 2014).

¶ 18 On January 29, 2018, Gardner underwent a functional capacity assessment (FCA) with ATI physical therapy. The report noted that the occupational demand for a patrol deputy was "medium," but Gardner's demonstrated physical demand limit was "light." It charted Gardner's capabilities as, *inter alia*: (1) workday- 4 hours; (2) sitting- 3 hours, 40 minutes; (3) standing- 1 hour, 20 minutes; and (4) walking- 2 to 3 hours, occasional, moderate distances; and (5) carrying right/left- 32 pounds occasionally, 22 pounds frequently. He noted that Gardner's effort was "appropriate" and the results were "valid."

¶ 19 On February 7, 2018, IMRF and Gardner engaged in a phone consultation. Per IMRF records, IMRF informed Gardner that: (1) the purpose of the call was to let him know that IMRF

would be considering the next phase of his disability claim, total and permanent disability; (2) "IMRF law says that we can only consider medical evidence to determine if you are not able to work in some capacity"; (3) IMRF would consider more extensive medical records than had been considered in conjunction with the temporary disability claim; and (4) IMRF would (or had) sent Gardner an "activity" questionnaire.

¶ 20 Gardner completed a "daily living" questionnaire, dated February 4, 2018, indicating as follows. Gardner reported that he has worsening pain that limits the amount of time he can stand, sit, or drive. He is 6 feet, 1 inch tall and 235 pounds, about 20 pounds heavier than his pre-injury weight due in part to an inability to exercise. Regarding his daily routine, he wakes at 7:15 a.m. and gets three of his four children (ages 4 to 13) off to school. He drives his four-year-old twins to preschool and picks them up. He is able to help with chores such as laundry, dishes, vacuuming, and removing snow with a small snow-blower. These chores cause him pain and he is unable to do them with the frequency he once did. He is also able to help coach his son's sports practice for two hours, seeking relief in the recliner upon returning home. He has been experiencing more pain while coaching, making it difficult for him to concentrate. Sleeping is also difficult. He often changes positions, and even locations from bed to recliner. He has trouble staying in bed for longer than three hours due to "unbearable" pain.

¶ 21 On March 5, 2018, IMRF asked Dr. Noel Rao to review Gardner's file and provide an opinion as to whether Gardner met the section 7-150 criteria of being "unable to engage in any gainful activity" rendering him totally and permanently disabled. IMRF informed Dr. Rao that Gardner had received 30 months of temporary disability benefits and that his social security and workers' compensation claims had been denied (in part) and were currently being appealed.

¶ 22 On March 9, 2018, Rao submitted his opinion to IMRF that Gardner did not meet the section 7-150 criteria. Rao reviewed medical records back to 2010. Rao noted that, in the FCA, Gardner's demonstrated physical demand limit was "light." Rao continued, however, that many of Gardner's capabilities were in the normal or functional range, such as speech, strength in extremities, range of motion, squatting, gait, and posture. Therefore, Rao could not say that Gardner was unable to perform any gainful activity.

¶ 23 On March 15, 2018, IMRF, via a benefits manager, determined that Gardner did not meet the section 7-150 criteria. It informed Gardner of the same in a written letter attaching Rao's report. It explained that meeting the section 7-146 criteria did not satisfy the section 7-150 criteria, which carried the heightened standard of being unable to perform any gainful activity. It instructed that, should Gardner wish to appeal "this decision," he should file IRMF Form 5.70, "Request for a Hearing to Appeal Denial/Termination of IMRF Benefits."

¶ 24 C. Gardner's 2018 Appeal to the IMRF Board

Decided December 2021

¶ 25 On April 24, 2018, Gardner, through counsel, submitted IRMF Appeal Form 5.70. He checked the box indicating that he wished to submit additional evidence at a later date. On May 2, 2018, IMRF notified Gardner that it had received his Form 5.70. In subsequent correspondence, IMRF informed Gardner that it would be seeking additional evidence of its own.

¶ 26 Between 2018 and 2021, Gardner and IMRF corresponded via e-mail regarding the release of his temporary disability funds. IMRF informed Gardner that the workers' compensation and social security cases would need to be completed and he would need to cease the instant appeal in order for his funds to be released.

¶ 27 In 2020, IMRF re-initiated its correspondence with Kane County as documented in a series of e-mails. On October 6, 2020, IMRF requested Gardner's employment status. Kane County answered that Gardner was "active on leave of absence." Kane County continued that IMRF's request "prompted [it] to research this case a little further"; it was now looking into whether it could terminate Gardner's employment.

¶ 28 On January 12, 2021, IMRF asked Kane County whether Gardner underwent any vocational assessments in conjunction with his workers' compensation case. Kane County responded:

> "[In 2015, Gardner] was released by a physician back to full-duty as a patrol officer with restrictions. The County was able to accommodate his restrictions, however, [Gardner] refused to accept his position. This went to court and the Illinois Worker's Compensation Commission issued a decision on 10/26/16 that Mr. Gardner was not entitled to TTD after June 7, 2015. He was offered accommodations that met his restrictions but made no effort to return to his position. Based on his release to his original position, no vocational assessments were done."

¶ 29 On February 4, 2021, IMRF asked Kane County whether it had a copy of Kane County's 2015 offer to accommodate Gardner. On February 11, 2021, Kane County responded:

> "[Gardner] does not dispute that he was offered his patrol position with accommodations according to his medical note. *He was given an opportunity to wear modified equipment (such as cargo pants) that met his restrictions (confirmed by doctors and the arbitrator) and he declined. This is all established in the court record.* No new conversations are known to me. I do have a letter from [Gardner] to [Kane County] indicating that in his personal opinion, he can't do patrol but [he] can do any other job ***,

so he confirms he is capable of working and is declining his patrol position based on his own opinion. This is dated December 18, 2015. Again, this is not a new communication, but it may be new to you so I am including it." (Emphasis added.)

¶ 30 IMRF ultimately considered the following additional evidence in relation to the total and permanent disability appeal: (1) Gardner's workers' compensation partial denial and settlement; (2) Gardner's social security disability claim denial; (3) updated medical records from treating Drs. Konowitz, Adam Schiff, and Igor Retchitsky; (4) an updated daily living questionnaire; (5) an updated functional capacity evaluation (FCE); (6) a vocational assessment; (7) an independent medical exam by Dr. Christopher Pasquale; and (8) a peer review by Dr. Solomon Rojhani.

¶ 31 1. Workers' Compensation Decision

¶ 32 Gardner submitted the written partial denial of his workers' compensation claim and ultimate settlement in his appeal of the arbitrator's workers' compensation decision. However, IMRF-generated documents show that it had already received the arbitrator's workers' compensation decision in August 2017. That decision was dated October 25, 2016. Testimony was taken at the hearing on December 21, 2015, and January 19, 2016. Earlier deposition testimony was taken in 2014 and 2015.

¶ 33 The arbitrator ruled in favor of Gardner on two issues, finding that Gardner's injuries were caused by the 2010 incident when he wrestled with a suspect and that Gardner's disputed medical treatments were necessary and should be paid for through workers' compensation. In making its causation determination, the arbitrator found Dr. Konowitz, who had testified via deposition in July 2015, to be a reliable witness.

¶ 34 The arbitrator ruled against Gardner on whether he was entitled to temporary total disability benefits:

"The arbitrator finds that [Gardner] is not entitled to TTD benefits after June 7, 2015.

[Gardner] was transferred to the Patrol Division in 2015, where he has been offered *and is being offered* accommodations for his restrictions. Petitioner did not even attempt to return to the position of patrol officer with accommodations for his restrictions." (Emphasis added.)

¶ 35 The arbitrator relied heavily on the testimony of lieutenant Gengler, which was taken December 21, 2015, and/or January 19, 2016. Gengler testified to an October 2015 note from Dreyer Medical Clinic, which provided that Gardner was unable to wear the full duty vest due to aggravation of the cluneal nerve. Gengler believed that Kane County could accommodate Gardner's restriction by using, *inter alia*, cargo pants to place his equipment in an alternative manner. This alternative placement would lighten the belt and vest and would neither render Gardner unsafe nor prevent him from performing full patrol duties. Gengler further testified that, beginning in November 2015, he and Gardner had exchanged letters regarding Gardner's restrictions and Kane County's ability to accommodate them.

¶ 36 The arbitrator acknowledged that, in refusing Kane County's accommodation, Gardner disagreed as to the safety of Kane County's proposed equipment placement. He noted, however, that Gardner was not a safety expert. The arbitrator further noted that Konowitz had not limited Gardner from carrying his equipment in this way, nor had he limited Gardner from running or lifting.

¶ 37 The arbitrator discounted the opinion of Dr. Konstantine Slavin, who had reported that Gardner was in no condition to return to normal activities due to pain that was unlikely to improve. The arbitrator went on to note evidence of Gardner engaging in the following activities, as seen by

a hired surveillant in September 2014: (1) yard work, including mowing the lawn; (2) participating in his son's football practice, including carrying an equipment bag and placing multiple bags in a trunk, walking/jogging across the field, and bending at the waist; (3) standing for over one hour at a football game (though the arbitrator acknowledged that the doctor was unclear as to whether the one-hour standing restriction applied only when Gardner was wearing equipment); and (4) lifting a child over his head while performing a twisting motion. The surveillant observed additional activity in 2015: (1) carrying a child and placing the child in a car (January 2015); (2) additional yard work, including carrying a ladder and a hedging machine (summer 2015). Also, per Gardner's own testimony, Gardner participated in a June 2015 golf tournament. From this evidence, the arbitrator inferred that Gardner "does not want to return to the position of patrol officer." Gardner appealed the workers' compensation decision, but, on October 5, 2018, entered into a settlement.

¶ 38 2. Social Security Disability Decision

¶ 39 Gardner submitted the written denial of his social security disability claim, dated January 3, 2020. Gardner had claimed the onset of disability—defined under social security law as the inability to perform any substantial, gainful activity within 12 months—as January 17, 2017. The administrative law judge noted that, although Gardner's former position of patrol was described as moderate work, the manner in which Gardner had performed the position was actually heavy work. The judge acknowledged Gardner's testimony that, although Gardner was an assistant coach for his son's football team, Gardner was able to lay down on the sidelines when he experienced back pain. The administration's independent examiner had determined that Gardner could stand or walk for two hours per day and sit for six hours per day, as long as he could change positions every one to two hours for 5 to 10 minutes at a time. Although the judge denied Gardner's claim

on the basis that there were jobs available in the national economy for Gardner, the judge agreed that Gardner was limited to sedentary work and could no longer perform the position of patrol.

¶ 40 3. Updated Medical Records

¶ 41 Gardner submitted additional medical records from his office visits with Konowitz from February 13, 2018, to October 1, 2019, which occurred approximately every six weeks and were focused on pain management. In March 2019, Konowitz noted that Gardner has had recent, unprovoked chest pains but no arm pains; his stress test was "negative" and he had an appointment with a cardiologist. In May 2019, Konowitz changed Gardner's sleep medication because it caused migraines. Konowitz noted that standing and sitting continued to be problematic, but that Gardner's gait had improved slightly.

¶ 42 In September 2019, Konowitz referred Gardner to Dr. Adam Schiff regarding Gardner's foot. Konowitz had relayed to Schiff that Gardner had four nerve-excision surgeries, which were progressively less effective, and regular injections to manage pain, which were also progressively less effective. Schiff opined that further surgery would not benefit Gardner, and that Gardner was likely experiencing synergistic pain from both his low back and foot issues.

¶ 43 In November 2019, Konowitz referred Gardner to Dr. Igor Retchitsky. Retchitsky tested Gardner for "RSD syndrome" but could not find objective evidence of it. He further indicated: "Of course, terminal sensory branch-neuropathy suspected in this patient with persistent painful symptoms following Morton's neuroma resection could not be detected electro-diagnostically."

¶ 44 4. Updated Daily Living Questionnaire

¶ 45 On Feb 10, 2020, Gardner completed an updated daily living questionnaire. Gardner reported performing activities similar to those he had reported in the 2018 questionnaire. Pain would begin as soon as 15 minutes into a task. Gardner would seek medication or the recliner to

calm his nerve pain. The longer his nerves were aggravated, the longer it would take for medication and rest to provide relief.

¶ 46 5. Updated FCE

¶ 47 On July 28, 2020, Gardner underwent a functional capacity evaluation (FCE). The "overall" finding was that "abilities as demonstrated fall within the low end of the sedentary level of work range with less than sedentary tolerances for sitting and standing and significant self-limiting performance." The report noted that Gardner self-limited and did not give full effort to tasks related to weight handling, walking, stair climbing, and repetitive squatting, due to self-reported pressure in his chest, tingling in his arm, and pain in his right foot. (Gardner reported that he was under the care of a cardiologist for recent symptoms including chest pain and blurred vision.) As such, Gardner's potential for these tasks could not be ascertained. Gardner did *not* self-limit on sitting, standing, kneeling, balance, or grip tasks. Gardner demonstrated mild gait deviation, including decreased weight bearing on the right side and decreased ankle movement. Gardner demonstrated moderately severe postural deviation, with decreased weight bearing on the right side, trunk shifting to the left side, and hip and knee flexion. These deviations impacted the "quality" of sitting and standing. Over the two-hour evaluation, the reporter observed a "mild" increase in Gardner's gait "limp" pattern, and Gardner self-reported that his pain increased from a 6 to a 7 on a scale of 10. Gardner's pain reports correlated with observed pain behaviors, including gait deviations and slow movement on certain tasks.

¶ 48 6. Vocational Assessment

¶ 49 On September 25, 2020, Julie Edwards of Managed Medical Review Organization provided a vocational report to IMRF. In it, she qualified that it was outside the scope of her expertise to determine whether Gardner's pain was subjective or objective. She reviewed the FCE

and noted that Gardner displayed self-limiting behaviors. Nevertheless, her reading of the FCE was that Gardner would not be suitable even for sedentary level work, because his tolerance for sitting and standing is only occasional. Accounting for this physical limitation and Gardner's transferrable skill set, she did not find a vocational match for Gardner.

¶ 50 7. Dr. Pasquale's Independent Medical Exam

¶ 51 On October 10, 2020, IMRF requested an opinion from independent medical examiner, Dr. Christopher Pasquale, as to whether Gardner met the definition of total and permanent disability under section 7-150 of the Pension Code. IMRF's request characterized the FCE results showing that Gardner had a low tolerance for sitting as inconsistent with Gardner's own daily living questionnaire, where Gardner "frequently referenced" sitting in a recliner.

¶ 52 On November 16, 2020, Pasquale returned his report to IMRF opining as follows. The medical records and diagnoses, as well as his examination of Gardner, supported Gardner's claim of chronic pain, which has progressed since the onset of disability. That Gardner sits in a recliner is not inconsistent with a low tolerance for sitting; a recliner "offloads" most axial pressure on the spine and piriformis region. Though it was often difficult to find physical support for the source of chronic pain, Gardner was receiving pain management care including periodic injections. Gardner's spinal-cord stimulator had failed to relieve pain, ultimately requiring removal. Pasquale concluded: "[Gardner] continues with ongoing pain management, with objective data from physical work performance evaluation that supports the conclusion of an inability for sustained sedentary work, thus meeting the criteria for being totally and permanently disabled per Section 7-150 of the Pension Code."

¶ 53 On April 4, 2021, IMRF asked Pasquale to reconsider his opinion given the workers' compensation and social security decisions. It also asked Pasquale to reconsider evidence that it

felt contradicted Pasquale's opinion, including the FCE's qualification that Gardner had exhibited significant self-limiting behavior.

¶ 54 On March 26, 2021, Pasquale reported that his opinion was unchanged. He remained convinced by his independent review of the medical reports and his own examination of Gardner that Gardner was totally and permanently disabled.

¶ 55 8. Dr. Rojhani's Peer Review

¶ 56 On April 16, 2021, IMRF engaged Dr. Solomon Rojhani to perform a peer review of Pasquale's report and to provide his own opinion as to whether Gardner met the definition of total and permanent disability under section 7-150 of the Pension Code. On April 26, 2021, Rojhani returned his report to IMRF. Rojhani provided a detailed synopsis beginning with Gardner's 2018 medical records. He noted that Gardner was under care for pain management and cardiology. He agreed that the medical records corroborated Gardner's self-reports of pain. However, he concluded that Gardner's condition did not limit "his ability to perform any gainful activity/sedentary work," and in support observed that Gardner's physical exam was "most unremarkable," showing no significant physical impairment, no motor, sensory, or reflex loss, and a normal gait.

¶ 57 D. IMRF Benefits Review Committee Recommendation and Board Decision

¶ 58 A May 17, 2021, IMRF document titled "*Temporary* Disability Board Hearing & Total and Permanent Disability Board Hearing," contained a "staff decision and rationale." (Emphasis added.) The staff decision and rationale summarized various documents but did not reference any testimony. As to temporary disability, the staff in part tracked the language in Kane County's February 11, 2021, e-mail:

> "Recently provided documentation from [Kane County] confirms that [Gardner] was offered a patrol position with accommodations. *He was given an opportunity to wear modified equipment (such as cargo pants) that met his restrictions (confirmed by doctors and the arbitrator) and he declined ***. This is all established in the court record in the Workers' Compensation Arbitrator's decision[.]* Mr. Gardner declined to accept the patrol duty position even though his employer was willing to reasonably accommodate the restrictions provided to them by Mr. Gardner's physician. Therefore, Mr. Gardner's IMRF temporary disability benefits *should* terminate effective 12/[11]/2015; the date his IMRF employer was willing to reasonably accommodate his work restrictions and the date he refused to return to his modified job." (Emphasis added.)

As to total and permanent disability, the staff summarized the relevant documents in a manner unfavorable to Gardner but did not issue an express recommendation. The May 17, 2021, document cross-referenced an upcoming IMRF Benefits Review Committee hearing.

¶ 59 On November 18, 2021, the IMRF Benefits Review Committee conducted a hearing. In its minutes, styled as a decision, it set forth two issues: (1) "Should Mr. Gardner be retroactively terminated as of 12/[11]/15? Can he be considered Temporarily disabled beyond 12/11/15 due to Mr. Gardner's refusal to accept the reasonable job accommodations by his IMRF employer?"; and (2) "Is Mr. Gardner eligible for IMRF total and permanent disability benefits effective March 1, 2018 ***?" The Committee, specifying that it had reviewed the documentary evidence and the staff's "information packet," retroactively terminated Gardner's temporary disability benefits to December 11, 2015. It found that Kane County "continues to offer" Gardner reasonable accommodations, which he has declined to accept. As such, Gardner did not meet the eligibility requirements for section 7-146 temporary disability benefits and the denial of total and permanent

disability benefits was moot. The Committee recommended that the full IMRF Board agree to retroactively terminate Gardner's temporary disability. The Board so agreed.

¶ 60 On December 1, 2021, IMRF sent Gardner a letter informing him that, on November 18, 2021, the Committee considered his appeal and recommended that the "original decision" to terminate temporary disability benefits be upheld, and, on November 19, 2021, the Board agreed. IMRF does not point us to any primary documentation of the Board's November 19, 2021, decision. Rather, in its appellate brief, IMRF refers to the December 1, 2021, letter, as well as the November 18, 2021, Committee minutes, as the final agency decision. The December 1, 2021, letter, does not inform Gardner the total and permanent disability claim was rendered moot.

¶ 61 E. Administrative Review

¶ 62 On December 23, 2021, Gardner filed a complaint for administrative review. He argued that, under either the clearly erroneous or the manifest weight standard, IMRF erred in determining that he was not disabled as defined under section 7-146 of the Code after December 11, 2015. In Gardner's view, IMRF followed the workers' compensation decision and focused on Kane County's December 2015 offer to the exclusion of other evidence. Regarding Kane County's December 2015 offer, IMRF mischaracterized Gardner's December 2015 answer as a refusal to return to work. In fact, Gardner had attempted to return to work as a patrol officer in June 2015 with lighter equipment but experienced too much pain.

¶ 63 In addition, Gardner observed that the December 2015 accommodation focused only on the weight restriction and did not consider other deficits such as his inability to subdue resisting suspects—the very cause of Gardner's initial injury. The remaining evidence established that Gardner was disabled after December 2015. For example, the social security administration, which evaluated Gardner's abilities from January 1, 2017, to October 22, 2019, determined that

Gardner could perform less than the full range of sedentary work. Dr. Pasquale, in later exams, concluded that Gardner did not have the ability to function even at the sedentary level of work. Finally, although the 2020 FCE noted self-limiting behavior, that self-limiting behavior was a result of chest pain and not a desire to manipulate the results. The January 2018 FCA, which had concluded that Gardner could handle only light physical demands and a four-hour workday, noted appropriate effort and valid results.

¶ 64 IMRF responded that Kane County informed IMRF on September 25, 2015, that it had given Gardner accommodations, but Gardner still was unable to perform his duties. "Since IMRF was informed that no accommodations could be made to allow [Gardner] to perform duties, IMRF continued to pay [Gardner] temporary disability benefits up to the statutory limit of [30] months, or until February 28, 2018." IMRF continued that "In 2021 and after undergoing a review for total and permanent disability, however, IMRF received new information from the County about [Gardner's] workers' compensation case. IMRF received a copy of a letter from the County dated December 4, 2015, which offered [Gardner] a modified uniform that met the restrictions imposed by [Gardner's] physician."

¶ 65 IMRF argued that this new evidence supported its decision that Gardner did not meet the section 7-146 definition of disabled after December 11, 2015. IMRF recounted that, in July 2015, Konowitz had released Gardner to return to work with the restriction of a modified duty belt and vest. In December 2015, Gardner refused Kane County's offer to accommodate this restriction. The October 2016 workers' compensation decision confirms that these accommodations were not unsafe, as had been argued by Gardner, and were "indicated" to be the same as with the school resource position. IMRF next noted that Drs. Rao and Rojhani had concluded that Gardner was able to perform *some* work such that he was not totally and permanently disabled. Though these

opinions were offered in consideration of the question of total and permanent disability, IRMF urged that they were "nonetheless useful in determining Gardner's physical abilities."

¶ 66 As to Pasquale's independent medical exam and the 2020 FCE, IMRF argued these should be discounted because they were "done to determine the extent of total and permanent disability, an issue which was rendered moot by the final decision." In any event, IMRF reminded the court that the 2020 FCE showed self-limiting behavior.

¶ 67 The circuit court affirmed IMRF's retroactive termination of Gardner's temporary disability benefits to December 11, 2015. The court noted that, in the course of considering whether Gardner qualified for total and permanent disability benefits, "IMRF ascertained information that caused it to revisit its 2015 decision granting [Gardner's] application for temporary disability benefits." The court explained that the following evidence supported the IMRF's decision:

> "First, there is a July 2015 statement from [Gardner's] treating physician [Konowitz] stating that [Gardner] is released to return to full duty on the condition that [he] be allowed to use a modified duty belt and vest. Second, there is a December 4, 2015, letter in which Kane County informed [Gardner] of several equipment and uniform accommodations that could be made to allow him to return to work as a patrol deputy. Third, there is testimony [in the workers' compensation proceedings] from Lieutenant Patrick Gengler of the Kane County Sheriff's Department stating both that [Gardner] could perform all of the duties of a patrol deputy with the offered accommodations and that none of those accommodations would render [Gardner] any less safe. Fourth, there are reports from Dr. Noel Rao and Dr. Solomon Rojhani, both of whom reviewed [Gardner's] records and concluded that [Gardner] was not totally and permanently disabled [footnote: 'Although the only issue

> before the Board below was whether plaintiff was temporarily disabled, the Board relied in part on medical findings contained in reports prepared when plaintiff's claim was being evaluated for permanent and total disability.'] Fifth, there was evidence [in the workers' compensation proceeding] that [Gardner] played in a 2015 golf tournament and carried his own clubs, that plaintiff was able to move and carry heavy football equipment at his son's football practices, and that plaintiff was able to hold a child above his head while twisting from side to side. Finally, it is uncontested that [Gardner] not only refused all of the offered accommodations but also refused to return to work even after those accommodations were offered. In other words, despite being released to return to work as a patrol deputy subject to certain accommodations, [Gardner] never even tried to do the job with the accommodations in place."

¶ 68 The circuit court acknowledged that other reports in the record supported the conclusion that Gardner was unable to return to work. It explained, however, that the question was not whether there is any evidence in the record contrary to IMRF's decision but whether there is any evidence in the record supporting IMRF's decision. The court concluded there was ample evidence.

¶ 69 II. ANALYSIS

¶ 70 On appeal to this court, Gardner argues as a self-represented litigant that the IMRF erred in retroactively terminating his temporary disability benefits to December 11, 2015. He asserts that the evidence overwhelmingly shows that he met the section 7-146 definition of temporary disability from December 11, 2015, through February 28, 2018, as IMRF had originally approved.

¶ 71 Preliminarily, we note that prior to May 2021, IMRF had affirmatively represented to Gardner and to the examining professionals that the temporary disability claim was completed and

only the total and permanent disability claim remained to be determined and open for review. For example, in the February 7, 2018, phone consultation, IMRF informed Gardner that his claim was entering the "next phase" and "IMRF law says that we can only consider medical evidence to determine if you are not able to work in *some* capacity." (Emphasis added.) In its March 15, 2018, denial of Gardner's total and permanent disability claim, IMRF informed Gardner that, although he had previously met the section 7-146 criteria, he failed to meet the 7-150 criteria. In informing Gardner of his right to appeal the decision denying/terminating his benefits, IMRF referenced only the 7-150 decision. Gardner was not informed that appealing the section 7-150 decision placed his section 7-146 award in jeopardy. Indeed, apart from the unsupported suggestion of concealment (see *supra* ¶ 64), it is entirely unclear from the record why, procedurally, IMRF altered the scope of Gardner's 2018 appeal from the denial of total and permanent disability benefits to include Gardner's temporary disability benefits. The first reference to the change in scope can be found in IMRF's May 17, 2021, staff decision and rationale, just after independent examiner Pasquale declined to amend his opinion that Gardner qualified for total and permanent disability. Gardner argues generally that this process was unfair but otherwise does not develop any statutory or due process argument. IMRF does not refer us to any cases decided under sections 7-146 to 7-150 that involve IMRF's recission of a previously awarded temporary disability benefit; nor does IMRF direct us to statutory authority or its own internal rules allowing for or delineating the conditions for rescinding a previously awarded temporary disability benefit. Ultimately, however, these procedural concerns do not inform our analysis.

¶ 72 When reviewing the decision of an administrative agency, this court reviews the agency's decision, not that of the circuit court. *Edwards v. Addison Fire Protection District Firefighter's Pension Fund*, 2013 IL App (2d) 121262, ¶ 31. The administrative agency is required to provide

the trial court with a sufficiently complete record of the proceedings as part of its answer to a plaintiff's complaint for administrative review, so that the trial court may properly perform its judicial review function. *Soto v. Board of Fire & Police Commissioners of the City of St. Charles*, 2013 IL App (2d) 120677, ¶ 22. This duty rests with the agency because plaintiffs typically have no meaningful access to the agency's records. *Mueller v. Board of Fire & Police Commissioners of the Village of Lake Zurich*, 267 Ill. App. 3d 726, 733 (1994).

¶ 73 The applicable standard of review depends on whether the issue is one of law, one of fact, or a mixed question of law and fact. *Beggs v. Board of Education of Murphysboro Community Unit School District No. 186*, 2016 IL 120236, ¶ 50. Questions of law are reviewed *de novo*. *Id.* An agency's factual determinations are considered *prima facie* true and are not to be reversed unless they are against the manifest weight of the evidence. *Id*. A finding is against the manifest weight of the evidence if the opposite conclusion is clearly evident. *Id*. Mixed questions of law and fact are not to be reversed unless they are clearly erroneous. *Id*. "An administrative decision is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Id*. (quoting *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001)).

¶ 74 Of the three standards of review, manifest weight review is the most deferential. *AFM Messenger*, 198 Ill. 2d at 392. If there is anything in the record that fairly supports the decision of the agency, the decision must be sustained. *Gumma v. White*, 345 Ill. App. 3d 610, 615 (2003). Still, the appellate court has a duty to review the entire administrative record, *Derringer v. Civil Service Commission*, 66 Ill. 2d 239, 241 (1978), and the agency's decision must be just and reasonable considering all of the evidence presented. *Soto*, 2013 IL App (2d) 120677, ¶ 22.

Further, we remain mindful that agencies acting under the authority of the Pension Code owe a fiduciary duty to pension fund participants and beneficiaries. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 507 (2007).

¶ 75 Gardner argues that either the clearly erroneous or the manifest weight standard of review apply. IMRF urges an application of the manifest weight standard of review. IMRF cites to *Hadler v Illinois Municipal Retirement Fund*, 2018 IL App (2d) 170303, ¶ 24, which provides that whether a plaintiff is disabled is a question of fact where the parties do not dispute the statutory definition of disabled. As we will explain, *infra* ¶ 80, the parties do not dispute the statutory definition of disabled. Thus, we proceed under manifest weight review, cognizant that if IMRF cannot survive the manifest weight standard of review, neither can it survive the less deferential clearly erroneous standard of review.

¶ 76 Turning to the statute, section 7-146 of the Pension Code defines a temporary disability:

> "(a) The participating employee shall be considered temporarily disabled if:
>
> 1. He is unable to perform the duties of any position which *might reasonably be assigned to him* by his employing municipality or instrumentality thereof or participating instrumentality due to mental or physical disability caused by bodily injury or disease ***;
>
> 2. The Board has received written certifications from at least one licensed and practicing physician and *** the employing municipality *** stating that the employee meets the conditions set forth in subparagraph 1 of this paragraph (a). ***" (Emphasis added.) 40 ILCS 5/7-146 (West 2014).

¶ 77 Section 7-147 addresses the commencement and duration of temporary disability benefits, providing that they shall be payable:

"(a) Upon receipt by the fund of a written application therefor. ***.

(b) *Once a month* a[t] of the end of each calendar month;

* * *

(e) *** [F]or a period not to exceed the lesser of 30 months or a period computed as follows: ***;

(f) *while the temporary disability continues*." (Emphases added.) 40 ILCS 5/7-147 (West 2014).

¶ 78 Section 7-149 sets forth IMRF's periodic-check requirements:

"The Board *shall conduct periodic checks* to determine if any participating employee is [temporarily] disabled. Such checks may consist of periodic examinations by a physician or physicians appointed by the Board, requiring the employee to submit evidence of continuing disability and such other investigations as the Board may deem appropriate. The following shall constitute prima-facie evidence of termination of temporary disability:

(a) A written report by a physician appointed by the Board stating that the temporary disability has ceased;

(b) The earning of compensation by the employee from any source for personal services, in excess of 25% of the monthly rate of earnings upon which his disability benefits are based." (Emphasis added.) 40 ILCS 5/7-149 (West 2014).

¶ 79 Section 7-150 sets forth the parameters for total and permanent disability, for which a participant becomes eligible after exhausting his temporary disability benefits:

"(a) A participating employee shall be considered totally and permanently disabled if:

1. He is unable to engage in *any gainful activity* because of any medically determinable physical or mental impairment which can be expected to result in death or be of a long continued and indefinite duration ***." (Emphasis added.) 40 ILCS 5/7-150 (West 2014).

¶ 80 The parties agree that this case turns on Gardner's continued ability to perform the December 2015 patrol position that was actually offered as opposed to a different, hypothetical light-duty position. In this case, the language in section 7-146 that Gardner must be unable to perform "any position which might reasonably be assigned" means the December 2015 patrol position. See 40 ILCS 5/7-146 (West 2014); *cf. Kouzoukas v. Retirement Board of Policemen's Annuity and Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 470 (2009) (the requirement in section 5-115 of the Pension Code that, to be disabled, a claimant must be unable to perform "any assigned duty or duties in the police service" means that the claimant must actually have been assigned the duty). Where Kane County made no further offer of accommodation beyond an equipment modification even as Gardner remained "on leave" status for years, any hypothetical light-duty positions, such as those involving decreased sitting and standing time, do not constitute a position which "might reasonably be assigned" to Gardner.

¶ 81 A review of the record belies IRMF's contention that it lacked knowledge of the December 2015 offer as well as its characterization of Gardner's response to the same. IMRF informed both the circuit court and this court that, in 2021, it received "new" information that Gardner declined a December 2015 offer to return to work as a patrol officer with accommodation. By its own records, however, IMRF received a copy of the workers' compensation decision in August 2017, not in 2021. Indeed, IMRF even referenced the workers' compensation decision in its March 2018

letter to Dr. Rao. Accordingly, we do not credit IMRF's suggestion that it had been misled and was justified on that basis in retroactively terminating a claim that it had approved *six years* earlier.

¶ 82 Further, in relying on the workers' compensation arbitrator's characterization of Gardner's "rejection" of the December 2015 offer, IMRF failed to consider Gengler's reported testimony in the context of the written documentation. Again, Gengler testified before the workers' compensation arbitrator that he and Gardner had exchanged letters concerning Kane County's ability to accommodate Gardner's restriction. This testimony described the December 2015 offer and Gardner's supposed rejection of the same. The December 2015 offer letter, however, reads more favorably to Gardner than the workers' compensation arbitrator's characterization of it. Whereas the arbitrator characterized Gardner's response as a final refusal, the letters themselves read as an offer and counteroffer to which Gardner received no response. See *supra* ¶¶ 12-13.

¶ 83 In another discrepancy related to the December 2015 offer, IMRF represented to the circuit court and to this court that Gardner testified before the *IMRF Benefits Review Committee in 2021* regarding his condition where he stated that the equipment accommodation continued to be made available, but that he believed those accommodations to be unsafe. To the contrary, Gardner testified before the *workers' compensation commission in 2016* as to his condition and that the equipment modification continued to be made available to him but that he believed those accommodations to be unsafe. The November 18, 2021, minutes expressly stated that the Review Committee relied on medical documentation and other documentation in reaching its decision. There was no reference to Gardner's testimony. The pages in the record to which IMRF cites do not establish that Gardner testified before the Review Committee in November 2021 or even before the Board and its staff in May 2021, and IMRF's brief does not detail any purported 2021 testimony by Gardner. Gardner's reply brief, in turn, provides only that he "explained" his safety position to

IMRF at the "administrative hearing." Further, 2021 correspondence between IMRF and Kane County establishes that Kane County did *not* continue to offer Gardner a job with the equipment accommodation but, rather, was researching how to terminate Gardner. Moreover, the equipment accommodation, as applied to the whole of the temporary disability term, did not address key restrictions such as sitting and standing.

¶ 84 The record demonstrates that IMRF relied almost exclusively on Kane County's assessment of the workers' compensation decision. (Kane County had been the respondent in the workers' compensation case.) See *supra* ¶¶ 29, 58; see also *Derringer*, 66 Ill. App. 3d at 244 (declining to defer to a hearing officer's near exclusive reliance on the witnesses' interpretations of their actions as opposed to their actual actions). Such reliance was unreasonable. The workers' compensation decision focuses on the 2014 and 2015 timeframe. Indeed, the workers' compensation arbitrator terminated benefits beginning June 7, 2015, two months before the temporary benefits in the instant case even began. The IMRF temporary disability case covers the 2015 to 2018 timeframe. Thus, it was arbitrary for IMRF to focus only on Konowitz's July 2015 restriction of a reduced-weight belt and vest without also acknowledging Konowitz's subsequent restrictions from the January 2016 to February 2018 period, which included sitting and standing restrictions and, toward the end of the period, a recommendation that Gardner not work as an officer at all.

¶ 85 While it is the prerogative of IMRF to afford greater weight to certain evidence over other evidence, we can discern no reasonable basis to focus exclusively on Konowitz's 2015 recommendation, and not his evolving 2016 to 2018 recommendations. Similarly, we observe that the workers' compensation decision stressed its surveillant's 2014 and 2015 observations of Gardner engaging in physical activities. However, Gardner admitted to performing these and

similar activities through 2020 in his daily living questionnaires completed in furtherance of the IMRF total and permanent disability claim and appeal. These activities were placed into context by other evidence in the IMRF total and permanent disability case, including reports by healthcare providers who acknowledged Gardner's physical activities but nevertheless opined that Gardner could not work more than four hours per day. IMRF did not observe the witnesses in the workers' compensation proceedings, nor does it appear that IMRF was even given a transcript of their testimony. This raises the question of to which agency, exactly, IMRF asks us to defer—IMRF for its decision to accept the workers' compensation commission's findings as its own, or the workers' compensation commission for its assessment of the witnesses that testified before it. It was unreasonable for IMRF to rely so heavily on certain evidence in the workers' compensation case, stripped from the context of the related evidence generated in its own proceedings.

¶ 86 Having identified certain discrepancies surrounding the December 2015 offer, we turn to the remainder of the record. The record overwhelming establishes that Gardner remained temporarily disabled after December 11, 2015, in that he was not capable of performing the position of patrol with the *sole* accommodation of a reduced weight belt and vest. One month later, on January 26, 2016, Konowitz advised that, in addition to reduced weight equipment, Gardner's restrictions included those "related to driving." On February 9, 2016, Konowitz noted that Gardner's condition was unimproved and restricted Gardner from working patrol duty. In March 2017, Konowitz restricted Gardner from prolonged sitting and standing. In July 2017, Konowitz restricted Gardner from returning to police work in any capacity. These restrictions were set forth in the periodic certifications upon which IMRF relied in continuing to approve Gardner's temporary disability status, and nothing in the record directly contradicts them.

¶ 87 Additionally, Gardner's January 2018 FCA and February 2018 daily living questionnaire, while prepared with the question of total and permanent disability in mind, provide a window into Gardner's condition as the temporary disability period was ending. The FCA concluded that Gardner was not suited for the patrol position—the occupational demand of a patrol officer was "medium," but Gardner's ability was "light." The FCA further concluded that Gardner was capable of only a four-hour workday. The FCA reporter characterized Gardner's effort as "appropriate" and the results as "valid." Similarly, in his daily living questionnaire, Gardner reported worsening pain that limits the amount of time that he can sit, stand, or drive. He frequently needed to change positions and sought relief on a recliner upon return from a two-hour outing such as coaching.

¶ 88 The Social Security Administration's decision also assessed Gardner's condition during a portion of the temporary disability period. The decision covered 2017 to 2019 and put into context Gardner's ability to coach his son's football team, accepting that Gardner was able to take breaks when necessary to relieve pain. It determined that Gardner could not perform the position of patrol and was limited to sedentary work.

¶ 89 The next subset of evidence was collected after the temporary disability period concluded. The parties agree that this late-dated evidence nevertheless allows for a trier of fact to make limited inferences as to Gardner's 2015 to 2018 condition. In support of its decision to retroactively terminate Gardner's temporary disability benefits, IMRF observes the negative opinions of peer review Drs. Rao (March 2018) and Rojhani (April 2021); Dr. Ritchetsky's "unremarkable" 2019 findings; and the July 2020 FCE. Gardner counters that this evidence is not as unfavorable as IMRF contends and stresses that Edwards, the vocational expert, and Dr. Pasquale, the independent medical examiner, opined that Gardner could not work in any capacity, let alone as a patrol deputy.

¶ 90 We agree with Gardner that the "negative" opinions of Drs. Rao and Rojhani are not necessarily negative in the context of the section 7-146 temporary disability determination. Both Rao and Rojhani answered "no" to the question of whether Gardner's physical impairment precluded him from engaging in *any* gainful activity after February 28, 2018. They did not specifically address whether Gardner's physical impairment precluded him from performing the duties of a patrol deputy with the sole accommodation of modified equipment after December 11, 2015. Further, we observe that Rao determined that Gardner's physical demand limit was "light," and IMRF appears to concede that the physical demand required of a patrol officer is "medium." Rao made this determination just nine days after the end of the temporary disability period, increasing its relevance as compared to later opinions.

¶ 91 The 2020 FCE reported self-limiting behavior as to weight handling and certain repetitive activities, but it also reported that Gardner's complaints of pain *correlated* with observed pain behaviors and Gardner did *not* display self-limiting behavior as to sitting and standing. The FCE determined that Gardner had less than sedentary tolerances for sitting and standing, two of the restrictions most relevant to the question of whether Gardner could perform the position of patrol during the final two years of the temporary disability term.

¶ 92 Also, we note that Pasquale's November 2020 opinion that Gardner's condition had progressed to the point that he could not engage in any gainful activity is consistent with evidence that, between 2015 and 2018, Gardner could not perform the position of patrol with the sole accommodation being a reduced weight belt and vest. Pasquale addressed IMRF's concern that Gardner admitted to sitting in a recliner, explaining that Gardner's use of the recliner was not inconsistent with his sitting restriction but, rather, was an effective means to relieve pain-inducing pressure. When asked to reconsider his opinion considering the workers' compensation and social

security decisions, Pasquale explained that his own examination of Gardner confirmed Gardner could not perform even sedentary work.

¶ 93 Finally, we address IMRF's implicit position that Gardner has exaggerated his claims of pain. Our supreme court's decision in *Kouzoukas*, 234 Ill. 2d at 465-66, is instructive. There, in reversing the agency's determination that the claimant was not disabled pursuant to section 5-115 of the Pension Code, the court explained that, although no medical test revealed an abnormality that would explain the source of the claimant's pain, and thus the pain may have been subjective in the medical sense, the claimant presented objective evidence of pain in the legal sense. *Id*. Every doctor who examined the claimant believed that she was experiencing pain and their observations, diagnoses, and prescribed treatments were objective evidence of that pain. *Id*. at 466-67; see also *Hadler*, 2018 IL App (2d) 170303, ¶ 27 (IMRF Board's determination that claimant was not totally and permanently disabled pursuant to section 7-150 of the Code was against the manifest weight of the evidence where the claimant underwent ongoing and aggressive treatment for pain in her foot, including multiple surgeries, ineffective nerve blocks, an ineffective spinal cord stimulator, hospitalization, physical therapy, and pain medication).

¶ 94 As in *Kouzoukas*, although there was limited physical evidence to document the source of Gardner's pain, every treating physician believed that Gardner experienced pain. Dr. Retchitsky wrote that Gardner's condition often cannot be detected electro-diagnostically. Even the 2020 FCE to which IMRF points reported that Gardner's complaints of pain were consistent with his pain behaviors. Similarly, IMRF's peer reviewer, Dr. Rojhani, determined that the medical records were consistent with Gardner's self-reports of pain. Most compelling, however, is that Gardner has undergone, and doctors have recommended performing, nine surgeries in hopes of relieving his pain. These surgeries included the implantation and ultimate removal of a spinal-cord

stimulator. Doctors also prescribed and managed strong prescription pain medications. The doctors' treatment of Gardner's pain is objective evidence of the same.

¶ 95 Upon a review of the entire record, we cannot point to any evidence that, in context, fairly supports the recission of Gardner's temporary disability benefits. Accordingly, we determine that IMRF's decision was against the manifest weight of the evidence. We reverse IMRF's decision to retroactively terminate Gardner's temporary disability benefits and reinstate the 30-month temporary disability award. The question of total and permanent disability is no longer moot, and we remand for IMRF to consider Gardner's appeal of its 2018 denial of that claim.

¶ 96 III. CONCLUSION

¶ 97 The judgment of the IMRF Board and the circuit court of Du Page County are reversed and the cause is remanded.

¶ 98 Reversed and remanded.