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Post-Traumatic Stress Disorder and disability benefits: duty-disability or non-duty disability?

by Michael B. Weinstein

Five recent appellate court decisions, of which four involved firefighters, shed new light on whether certain psychological disorders, and Post-Traumatic Stress Disorder (PTSD), will result in an award of line-of-duty disability benefits. Three decisions upheld the award of only non-duty disability benefits, while in the other two cases the appellate court reversed the pension board's denial of duty disability benefits and awarded those benefits.

Three of the cases (*Siwinski v. Board of the Fireman's Annuity and Benefit Fund of Chicago*, 2019 IL App (1st) 180388, *Covello v. Village of Schaumburg Firefighters' Pension Fund*, 2018 IL App (1st) 172350, and *Miller v. Board of Trustees of the Oak Lawn Police Pension Fund,* 2019 IL App (1st) 172967) were decided by the Illinois Appellate Court, First District. One case (*McCumber v. Board of Trustees of the Oswego Fire Protection District Firefighters' Pension Fund*, 2019 IL App (2d) 180316) was decided by the Second District, while the fifth case (*Prawdzik v. Board of Trustees of the Homer Township Fire Protection District Firefighters' Pension Fund*, 2019 IL App (3d) 170024) was decided by the Third District.

Ultimately, each case was decided based upon its own facts; however, there exist some similarities in the way each court reached its conclusions. In each case, the court set forth an exhaustive review of the medical evidence as well as the conclusions of the pension fund's IME physicians doctors who reviewed the evidence pursuant to the applicable sections of the Illinois Pension Code (40 ILCS 5/3-115, 5/4-112 and 6-153). Furthermore, in each case the court found that the appropriate standard of review was the "manifest weight of the evidence" standard, a standard in which a pension board's conclusion will be reversed "only if the opposite conclusion is clearly evident." This standard of review is the most deferential to a board's decision.

Nevertheless, in two of the cases (*Siwinski* and *Prawdzik*) the appellate court reversed the pension board's denial of duty disability benefits. In the *Prawdzik* case, the court concluded that Prawdzik had presented evidence of a specific, work-related incident that aggravated his preexisting PTSD symptoms and "rendered his preexisting psychological condition permanently disabling."

In a somewhat similar vein, the *Siwinski* court concluded that the pension board ignored medical testimony that the plaintiff "did not exhibit signs or symptoms of PTSD until she was exposed to work related traumas" even though she suffered from Major Depressive Disorder prior to two work-related incidents.

Of the five cases, by far the most interesting is *Prawdzik*. In that case, the majority decision engendered a dissenting opinion. Gregory Prawdzik was a firefighter with the Homer Township Fire Protection District. At the same time, he was also a member of the Air National Guard and was deployed for military duty in Afghanistan for a 10-month period in 2008-09. During his deployment

Continued on page 4

Appellate court clarifies role of Pension Protection Clause

by John E. Motylinski

Illinois' Constitution contains a "pension protection clause" that prohibits the reduction or impairment of vested pension benefits. Using this provision, the Illinois Supreme Court has repeatedly struck down legislative and judicial attempts to lower pensioners' benefits. However, as the recent case of *City of Countryside v. City of Countryside Police Pension Board of Trustees, et al.*, 2018 IL App (1st) 171029, illustrates, not all benefits are covered by the pension protection clause—illegal ones may be reduced.

The Illinois Pension Protection Clause

Article XIII, Section 5, of the 1970 Illinois Constitution, commonly known as the "pension protection clause," provides that "[m]embership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." The Illinois Supreme Court has given this provision its plain meaning: public employees have an inviolable contractual right to their vested pension benefits, which cannot be diminished or impaired. *Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago*, 2016 IL 119618, ¶ 29.

Consequently, once an individual becomes a member of a public retirement system, any subsequent changes to the Illinois Pension Code or judicial order that would diminish the benefits promised to that

Continued on page 3

Erroneous benefit found to be outside police board's jurisdiction to correct under former Article 3 benefit correction statute

by Carolyn Welch Clifford

The Illinois Appellate Court, Fifth District, recently ruled that an Article 3 police pension fund lost jurisdiction to correct an erroneous retirement benefit. In *Ray v. Beussink & Hickam, P.C.*, 2018 IL App (5th) 170274, Kerry Ray, a retired member, sued his personal accountant, Scott Hickam—who also served as the Anna Police Pension Fund accountant—after the accountant's advice to Ray and benefit calculation for the pension fund was determined to be erroneous.

In June 2013, Ray was promoted to the position of Interim Chief of Police for the City of Anna, a position he held for less than a year when he retired on May 1, 2014. Before he retired, Ray consulted Hickam to determine what salary would be applicable to his retirement benefit. Hickam opined that Ray's retirement benefit would be based on the higher salary he received as Interim Police Chief. Based on this opinion, Ray proceed to retire with a retirement benefit that was $4,000 more annually than had it been based on his previous rank with the police department.

In 2016, an Illinois Department of Insurance ("DOI") audit of the Fund revealed that it had used an incorrect final rate of pay in setting Ray's retirement benefit. Because Ray had only been employed as the "interim" police chief for nine months at the time of retirement, the applicable rate of pay should have been based on his prior salary.

Indeed, under Section 4402.40(i) of the Illinois Administrative Code provisions that define "salary" for pension purposes, "[c]ompensation received for temporarily performing the duties of a higher rank or specialty rank position shall *not* be considered salary unless and until this compensation has been received continually for one full year." (50 Ill. Admin. Code 4402.40(i) [emphasis added])

In response to the DOI's audit findings, the Board corrected the error and reduced Ray's annual retirement benefit by $4,000. Unfortunately, the Board did not furnish a findings and decision on setting or correcting the retirement benefit. Therefore, the court's review of the Board's decisions on Ray's benefit were limited to the allegations in the complaint.

Between the time Ray retired in 2014 and the time the Board corrected the benefit in 2016, the Illinois General Assembly amended the Article 3 provision governing benefit correction. Previously, Section 3-144.2 of the Illinois Pension Code provided that the "amount of any overpayment, due to fraud, misrepresentation or error, of any pension or benefit granted under this Article may be deducted from future payments to the recipient of such pension or benefit." (40 ILCS 3-144.2) Thus, the "mistake" or "error" in setting Ray's retirement benefit occurred when this original statute was in place.

When the Board corrected the benefit in 2016, the new amended version of Section 3 -144.2 of the Illinois Pension Code was in place. The modern version of this statute provides an extensive definition of "mistake," which includes "a clerical or administrative error executed by the Fund or participant as it relates to a benefit." However, the term "mistake" under the new statute explicitly excludes:

> [A]ny benefit as it relates to the reasonable calculation of the benefit or aspects of the benefit based on salary, service credit, calculation or determination of a disability, date of retirement, or other factors significant to the calculation of the benefit that were reasonably understood or agreed to by the Fund as the time of retirement. (40 ILCS 5/3-144.2(a))

Also noteworthy is the fact that when the Illinois General Assembly amended Section 3-144.2, Section 3-148 of the Illinois Pension Code was also amended to specifically make an exception for benefit corrections under Section 3-144.2 from the time limitations set forth for actions under the Illinois Administrative Review Law. In other words, review of a final administrative decision must be commenced within 35 days from the date that the decision to be reviewed "was served upon the party affected by the decision." (735 ILCS 5/3-103) Under the new benefit correction provision, this limitation is no longer applicable to benefit corrections.

The court was confronted with the issue of whether the original or the amended version of the benefit correction statute applied. In trying to resolve this question, the court's analysis centered around the relevant "triggering event": the commission of the mistake in 2013, or the discovery of the mistake in 2016. The court ultimately concluded that the date the benefits mistake was finalized by the Fund was the "triggering event," meaning the older version of the benefit correction statute applied. However, the court also concluded that the amended version of Section 3-144.2 to be prospective in application and thus applied the earlier version of Section 3-144.2 in determining whether the Board's miscalculation of Ray's retirement benefit constituted an "error."

After reviewing case law that construed the earlier version of Section 3-144.2, the court concluded the Board made its salary decision based upon an incorrect interpretation of an Illinois Pension Code provision. Thus, it concluded that the miscalculation was not an "arithmetical error" that could be corrected by the Board. In short, under the prior benefit correction statute, the Board lacked jurisdiction to make the change to Ray's retirement benefit.

The court declined to determine the secondary issue in the litigation, which was whether Ray could maintain his accounting malpractice case against his and the Fund's accountant and remanded the case to the circuit court for further proceedings. ■

Continued from page 1

person cannot apply. On this basis, the Illinois Supreme Court has struck down various attempts by the General Assembly to "fix" the pension crisis. *See, Jones*, cited above; *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 57; *Kanerva v. Weems*, 2014 IL 115811, ¶ 83. Therefore, Illinois courts and the General Assembly must tread lightly when confronting issues that may result in prohibited pension diminution.

However, as the *City of Countryside* case demonstrates, only *vested* pension benefits are protected by the pension protection clause.

The *City of Countryside* Decision

Background

Broadly speaking, the *City of Countryside* case involves an illegal pension spike and a later attempt to undo the damage. In 2002, the City of Countryside bargained new contracts for its police officers that contained an $800 (and later, $850) longevity benefit for officers who have over twenty years of service and were "pension-eligible." The officers would designate a two-week pay period in either the first half of January or July to receive this benefit.

Later that year, the City and the Fraternal Order of Police ("FOP") collectively bargained for a calculation method for the longevity benefit. Specifically, when an eligible officer took a longevity benefit, their gross salary for pension purposes would be the product of the one-time $800 or $850 longevity benefit times twenty-four payroll periods, resulting in a final pensionable salary $19,200 or $20,400 *higher* than what the officer received in the prior year. In other words, the formula created a pension benefit spike for police officers at the time of their retirement. About ten retiring officers took advantage of the longevity benefit and received retirement pensions calculated under this method.

In 2010, the Illinois Department of Insurance (DOI) provided a written advisory opinion concluding that "only the $850 (1/26th of the annualized increase of $22,100) would be considered pensionable." In a separate advisory opinion, the DOI reiterated that the agreed-upon calculation method had "no bearing" on its determination because "salary" is defined by state law, which cannot be superseded by a collective bargaining agreement.

In February 2012, the City filed a lawsuit against the City of Countryside Police Pension Fund and the FOP. The City alleged (among other things) that the calculation method had created a "systemic miscalculation of benefits" and that the longevity benefit "spikes" were not pensionable salary. The City sought a declaration that the computation method was illegal and a determination that the Pension Board should cease making any further payments to retirees or beneficiaries in which pension spikes had occurred. The Pension Fund eventually filed a counterclaim alleging that the elimination of the computation method was prohibited by the pension protection clause of the Illinois Constitution.

The circuit court agreed with the City and concluded (among other things): (1) the Pension Fund's reliance on the calculation method was illegal; (2) the Pension Fund was required to recalculate the retirees' pension in accordance with their proper salaries (*i.e.*, without the pension spike); and (3) the Pension Board was prohibited from using the calculation method with respect to any future retirees. The Pension Fund, the retirees, and the FOP appealed.

The Illinois Pension Protection Clause Does Not Protect Illegal Benefits

On review, the Pension Fund and affected pensioners reasserted their argument that the pension protection clause prevents a court from *ever* diminishing a retiree's pension—even if doing so would eliminate an excess illegal payment or reduce a pension to a level authorized by law. The court disagreed.

The appellate court first analyzed the Illinois Supreme Court's guidance on the pension protection clause and found a common thread: in each case, the Illinois Supreme Court was called upon to review legislation that diminished the *vested* pension rights of current or retired employees, which thereby "breached the contract between the State and the retiree." In those cases, there was no issue that the employees' pensions had been incorrectly calculated from the beginning. In the *Countryside* case, by contrast, the retirees' pensions were calculated incorrectly—and illegally—at the outset.

As such, the appellate court held that there was no pension protection clause problem because the parties could only "contract" for benefits allowed by law. As the court put it, "a right cannot be protected if it does not exist," and the retirees had no right to illegal benefits. Although the court somewhat sympathized with the retirees insofar as they may have left service in reliance on the bad advice given to them at the time of retirement, the appellate court concluded that the pension protection clause does not prohibit a court from imposing a remedy to bring the retirees' pensions to the correct level permitted by law existing upon their retirements.

Implications and Conclusion

The *City of Countryside* decision is significant because it forecloses on any contention that the pension protection clause protects erroneous benefits. Indeed, no longer can municipalities, pension funds, and retirees establish "creative" pay schemes and pension spikes and try to hide behind the Illinois Constitution. For this reason, the *City of Countryside* case will be an important tool for pension funds seeking to correct mistaken benefits moving forward. ■

Post-Traumatic Stress Disorder

Continued from page 1

he encountered several life-threatening incidents, including approximately 10 rocket attacks. He also experienced improvised explosive device (IED) attacks, including one incident where he was rendered unconscious after his vehicle was flipped upside down into a crater. As a result of these multiple incidents, he felt that his life was under constant threat and that he would end up dying in Afghanistan.

Upon returning to work with the fire protection district, Prawdzik suffered from several symptoms of PTSD. Ultimately, he was diagnosed by doctors at the Department of Veterans Affairs (VA) as suffering from PTSD and was awarded VA disability benefits. He informed the District that he suffered from PTSD in July 2011.

On November 7, 2014, while working full duties as a firefighter, he inadvertently shut off all power to the fire truck that he was driving while the truck was traveling 45 miles per hour. This reminded him of his experience in Afghanistan when his truck was hit by an IED, and it caused him to again feel like he was going to die.

From that date until November 16 (two duty shift days later), he suffered PTSD symptoms that got progressively worse. He reported these issues to District personnel on November 16, was placed on modified duty, and never returned to full unrestricted firefighter duties thereafter. He filed for disability benefits with the District's Pension Fund on June 18, 2015.

As previously noted, the Pension Fund's Board of Trustees awarded Prawdzik a non-duty disability pension concluding that while he suffered from PTSD, the disability was not "incurred in and did not result from the performance of an act of duty or the cumulative effects acts of duty [sic]."

Prawdzik appealed the Board's decision to the circuit court of Will County. After reviewing the record, Judge John G. Anderson upheld the Board's decision, although he noted that had he been a member of the pension fund's Board of Trustees, he "might have reached a different conclusion."

On further appeal, the appellate court reversed. After reviewing all the evidence in the record, two members of the court concluded that the manifest weight of the evidence established that Prawdzik's disability "was caused, at least in part, by his work duties." In so doing, the court distinguished this case from an Illinois Supreme Court decision involving a police pension fund (*Robbins v. Board of Trustees of the Carbondale Police Pension Fund, et al.*, 177 Ill. 2d 533 (1997)) because the definition of "act of duty" is defined differently for police officers than for firefighters.

Applying the firefighters' definition of "act of duty," the majority held that a duty disability pension may be established if work related stress was a contributing factor, rather than the sole cause, of a disabling psychological condition. Thus, the evidence in the record on appeal established that certain acts of duty, including the November 7, 2014 incident, "causally contributed to Prawdzik's disability by aggravating the symptoms of his underlying psychological disorder and rendering it disabling."

The short dissenting opinion authored by Justice Schmidt reached the opposite conclusion. While applauding Prawdzik's "service to this country, which undeniably came at a great personal loss," he concluded that the record contained evidence that neither Prawdzik's "general firefighting/EMS duties nor the November 7, 2014 incident were 'causative factor[s] contributing to the claimant's disability.'" (quoting from *Scepurek v. Board of Trustees of the Northbrook Firefighters' Pension Fund*, 2014 IL App (1st) 131066, ¶ 27). Thus, he "would defer to [the Board's] finding that the November 7, 2014 incident, like others before and after, merely triggered symptoms of the plaintiff's preexisting PTSD but that the incident did not causally contribute to his disability."

Finally, Justice Schmidt suggested that the majority's analysis might result in unintended detrimental consequences in that it might deter police and fire departments from hiring combat veterans "if their general job duties might trigger some preexisting PTSD which would entitle them to receive a line-of-duty disability pension."[1]

In summary, fire and police pension boards, as well as the courts, continue to struggle with mental disability claims. Future cases, like these five cases, will be decided upon their individual facts, even though the underlying controlling law seems to be clear. ■

[1]Regarding police funds, however, the definition of "act of duty" with respect to police officers is more restrictive than that used for firefighters. The *Miller* case, cited above, did not find a duty-disability for a police officer.

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OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.
1804 North Naper Boulevard, Suite 350
Naperville, Illinois 60563
630-682-0085
www.ottosenbritz.com

Carolyn Welch Clifford, Editor
cclifford@ottosenbritz.com