LEGAL INSIGHTS
FOR PENSION BOARDS
OTTOSEN BRITZ KELLY COOPER GILBERT & DiNOLFO, LTD.

Volume 26, No. 1 -- Winter 2019

What constitutes an application for disability benefits?

by Michael B. Weinstein

It is settled law that a discharged police officer cannot later apply for disability benefits. But what constitutes an "application" for disability benefits? This was the question that confronted the Illinois Appellate Court in the case of *Keeling v. Board of Trustees of the Forest Park Police Pension Fund*, 2017 IL App (1st) 170804.

Officer Jason Keeling alleged that he had suffered a disability as a result of injuries that he sustained while working as a police officer in the Village of Forest Park. However, while he was on leave due to his injury, an internal investigation was commenced into certain allegations that were made against him. The investigation ultimately resulted in Keeling tendering his resignation as a police officer.

Prior to his resignation, Keeling met with his union representative who advised him to file an application for a disability pension. Keeling then met with Officer Rob Bryant, the president of the police union, who also happened to be a trustee of the Forest Park Police Pension Fund. According to Keeling, Officer Bryant brought a two-page document, entitled "Duty Disability/Occupational Disease … Information Request Form" to the meeting. At the meeting Keeling completed the document and both men signed it.

Officer Bryant later testified that he thought the information request form "would start the [disability] ball rolling" but "was not totally sure of the official start." Nevertheless, Bryant also knew that there was a separate application form. Furthermore, on the same day that Keeling and Bryant signed the information request form, the Board's attorney prepared correspondence to Keeling. While acknowledging Keeling's "request for an application for disability benefits" the Board attorney stated in the letter:

> In order for the Pension Board to *begin* to adjudicate your claim, the Pension Board will require you to fully complete the enclosed Application for Disability Pension benefits. Please completely fill out the enclosed Application and return it to me at the above address. [emphasis added]

The attorney's letter went on to describe the Board's disability hearing process and advised Keeling that "no action can be taken until such time as you complete and submit the enclosed Application…." Keeling acknowledged receiving this letter but testified that he did not immediately submit the application form because "it was too early in my treatment and I didn't know what the extent of my injuries would be."

Ultimately, on July 8, 2015, Keeling submitted his resignation, effective April 23, 2014. The next day he completed and filed the designated application form. However, given the fact that Keeling had terminated employment before he filed the designated application form, the Board of Trustees of the Fund held an evidentiary hearing to determine whether it possessed the necessary jurisdiction to consider his claim for disability benefits.

At the hearing, Keeling, through his attorney, argued that the information request form was sufficient to commence the disability proceeding or, alternatively, that he

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The limits of judicial deference in administrative review

by John E. Motylinski and Chloe Cummings

Administrative review before a court puts a pension board's determination of a benefit under a microscope. Although there is the prospect that the decision will be reversed, pension boards actually enjoy a significant advantage when their decisions are appealed thanks to the concept of judicial deference.

However, as illustrated by the recent case of *Ashmore v. Board of Trustees of the Bloomington Police Pension Fund*, 2018 IL App (4th) 180196, this deference is not without its limits. In *Ashmore*, the court reversed a pension board's decision to deny a police officer disability benefits, concluding that the board got the facts and its credibility determinations wrong in determining that the officer was not disabled. The case is instructive, as it is an example of a court concluding that a pension board's decision was so clearly wrong, that it justified substituting the court's determination to grant the police officer line-of-duty disability benefits.

Before analyzing the varying types of judicial deference, it is helpful to break down into three categories the types of issues on appeal. First, there are questions of fact, which are questions about what actually happened. Second, there are questions of law. These questions revolve around what the law says and how it applies to a given case. Finally, there are mixed questions of law and fact, which is a combination of the first two categories.

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Judicial deference

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Whether a given issue on appeal is a question of fact, a question of law, or a mixed question has significant consequences; specifically, which "standard of review" applies. A standard of review is the amount of deference a court affords to the decisions of the pension board. The extent of deference depends on whether the question is a question of law, a question of both law and fact, or a question solely based on fact.

There are three main standards of review that can be applied with respect to appeals of pension board decisions: the "manifest weight of the evidence" standard, the "clearly erroneous" standard, and *de novo* review.

The "manifest weight of the evidence" standard applies to questions of fact and provides great deference to the board. In fact, it is the most deferential standard with respect to an administrative agency's findings and conclusions. As such, where a board's ruling on a factual dispute is appealed, courts will generally not disturb the board's findings unless it is obvious that an opposite conclusion should have been drawn.

Review under the clearly erroneous standard is also very deferential to agency decisions. Courts apply the clearly erroneous standard to mixed questions of law and fact. Agency deference is given in situations of mixed questions of law and fact because agencies have specialized expertise and experience in a particular subject. Thus, when there is a mixed question of law and fact, an agency decision will be found to be erroneous only when the reviewing court, after looking at the entire record, is "left with the definite and firm conviction that a mistake has been committed." (*AFM Messenger Serv., Inc. v. Dep't of Employment Sec.*, 198 Ill. 2d 380, 395 (2001))

Not all standards of review grant the pension board substantial deference in the appeals process. An appeal that involves undisputed facts and statutory interpretation presents a question of law and is interpreted *de novo*. (See *Fields v. Schaumburg Firefighters' Pension Bd.*, 383 Ill. App. 3d 209, 210 (1st Dist. 2008)) The phrase "*de novo*" means "new" and allows a court to decide an issue without deference to prior decisions. In other words, *de novo* review calls for the court to independently review the question of law without adhering to lower court or administrative agency decisions.

What standard of review applies sometimes makes or breaks a case on appeal. As such, there is often dispute over which standard applies. However, even when the manifest weight of the evidence standard is applied—and the most amount of deference is given—pension boards are not guaranteed their decisions will be upheld.

The recent case of *Ashmore v. Board of Trustees of the Bloomington Police Pension Fund* illustrates these dynamics. There, a former police officer filed an application for disability pension benefits after a fall that occurred while pushing a vehicle out of the snow. While pushing the car, the officer slipped and fell on the ice placing all of his weight on his left arm. The officer argued that he was injured in an "act of duty" and was therefore entitled to a line-of-duty pension rather than a non-duty pension.

The pension board appointed three independent medical examiners to evaluate the officer. Two out of the three independent physicians found that the officer was disabled. The third physician, however, concluded that the officer's injuries resulted from the fall but, because his duties as a police officer were administrative in nature, the officer was not disabled under the Illinois Pension Code.

The Board concluded the officer was not disabled, finding the officer "less than credible" because of minor discrepancies in his medical records and testimony. The board also relied on the third IME physician's opinion that the officer was not disabled—even though it was the minority opinion. The officer appealed arguing that the Board's finding that he was not disabled was wrong.

The appellate court explained that whether a police officer is disabled is a factual determination, which means that the manifest weight of the evidence standard applied. Strikingly, the court found that the Board's decision was against the manifest weight of the evidence. For one, the Board had improperly relied on the third IME physician's report, which referred to the officer's job as "administrative" whereas, in reality, his job description required general policing duties. As such, the opposite conclusion was clearly evident.

Second, the appellate court concluded that the Board's determination regarding the officer's credibility was in error. The Board based its adverse credibility determinations on the fact that the officer's testimony and his medical records conflicted in parts. However, the court found with over two thousand pages of medical records, there were likely to be minor inconsistencies. Furthermore, the inconsistencies pertained to largely collateral issues and were irrelevant to the bigger picture of whether the officer was disabled. Therefore, the court held that in reviewing the record in its entirety, it was clearly evident that the officer was disabled.

On appeal, pension funds usually enjoy some deference to their findings and conclusions. What standard of review to be applied is often hotly litigated because they can result in divergent outcomes. The manifest weight of the evidence standard, for instance, is intensely deferential, while the *de novo* standard offers no deference whatsoever.

As demonstrated by the *Ashmore* case, however, this deference is not limitless. Where a pension fund makes a decision that is unsupported by the record, even the manifest weight of the evidence standard of review cannot save it. Therefore, pension boards should always strive to make decisions that accord with the evidence before them. ■

Bike training injury constitutes "special risk" to qualify for a line-of duty disability

by Robert W. Steele, Jr.

The Fourth District Appellate Court in Illinois recently found that a police officer injured during a voluntary bicycle-patrol training session was entitled to a "line-of-duty" disability pension in *Gilliam v. Board of Trustees of City of Pontiac Police Pension Fund and the City of Pontiac*, 2018 IL App (4th) 170232. The court recognized that the capacity in which an officer was acting also determines whether an officer's conduct involved a "special risk" and constituted an "act of duty" under Section 5-113 of the Illinois Pension Code (40 ILCS 5/5-113).

The court concluded that the officer was "acting in capacity that involved special risk" when she injured herself in attempting a special maneuver while "performing or learning to perform the duties of a bicycle-patrol officer." It did not matter whether the officer was injured during a training exercise or on actual patrol.

In April of 2012, Pontiac Police Officer Shawna Gilliam participated in a bicycle-patrol training program, taught by the International Police Mountain Bike Association ("IMPBA") instructor. The course was specifically designed to teach "tactics" used by officers while responding to calls and conducting traffic stops. These tactics included patrol procedures, night operations, and various maneuvers for felony pursuit.

Seeking to be certified for police bicycle-patrol duties, she reported to the four-day training session while on duty, wearing police equipment, and using a City-provided bicycle. While learning to perform a felony pursuit maneuver called "parallel curb ascending," she fell onto her right arm, injuring her forearm and wrist. She was later diagnosed with a "triangular fibrocartilage complex (TFC) tear requiring three surgeries." Doctors subsequently determined that she was unable to carry out her duties as a patrol officer due to the injury.

Three years later, Gilliam filed for a "line-of duty" disability pension (40 ILCS 5/3-114.1), and alternatively a "non-duty" disability pension (40 ILCS 5/3-114.2). The police department placed her on "non-pay status of employment." After a hearing was held in which the City of Pontiac was allowed to intervene, the Board of Trustees of the Pontiac Police Pension Fund voted 3-2 to deny Gilliam's request for a "line-of duty" disability pension, but unanimously voted in favor of her request for a "non-duty" disability pension. The Board found that Gilliam's disability was neither incurred by nor resulted from the performance of an "act of duty." The Board principally reasoned that the accident did not involve an act that "inherently involved a special risk."

Gilliam appealed the Board's decision to the circuit court. After a hearing was held, the circuit court reversed the Board's decision, and granted Gilliam's "line-of-duty" disability pension, finding that Gilliam was injured while performing an "act of duty involving special risk."

Appealing the circuit court's decision, the Board and the City argued that Gilliam was not entitled to receive a "line-of-duty" disability pension because her injury was not incurred in the performance of an "act of duty" as defined under the Code. The Board followed a narrow interpretation of the Code: that determining whether conduct involves a "special risk" is limited to assessing the activities the officer engaged in at the time, specifically whether those activities are "inherently dangerous" and produced the injury.

Disagreeing with this interpretation, the court relied on settled case law, reasoning that the "*capacity* in which the police officer was acting" ultimately determines whether conduct involves a "special risk." (See *Johnson v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 114 Ill.2d 518, 522 (1986) (traffic patrol officer slipped and fell while crossing the street to respond to a citizen's request for help; under the Code, the officer's conduct was an "act of duty")).

Due to the factual similarities, the court predominantly used the same analysis from *Alm v. Lincolnshire Police Pension Board*. 352 Ill.App.3d 595 (2nd Dist. 2004), in which an officer injured his knee while pedaling a bicycle on bicycle patrol. In *Alm,* the court held that officer was entitled to "line-of-duty" disability benefits. Agreeing with the *Alm* court, the court in *Gilliam* distinguished the "'precise physical act at the moment of the injury'" from "'the capacity in which the officer [was] acting.'"

In essence, a seemingly benign activity for an average citizen—when performed by an officer as routine patrol or otherwise—may hold "special risks." For an officer, bicycle patrol may include night riding, carrying additional weight from equipment, heightened awareness of surroundings, and specific maneuvering designed for pursuit and apprehension.

Here, the court's decision quoted the IMPBA's course description verbatim, which included "patrol procedures, tactics, night operations . . . [o]ff-road and riding and bike-specific live-fire exercises" to be included during training. Coupled with testimony as to the nature of felony pursuit through parallel curb ascending, wheel lifts, and speed variation, it was clear to the court that bicycle patrol came with special risks beyond those an ordinary citizen encounters.

To this court, and others in prior decisions, it does not matter whether an injury could occur to anyone engaging in the precise activity in which the officer was engaged. Even use of a specific maneuver by an ordinary citizen is distinguished from an officer using the same maneuver, because it is being done *while on patrol*. Further, the nature of the training simulates the capacity in which the officer will be acting; thus, those same "special risks not assumed by ordinary citizens [in] riding a bicycle" or doing other unique activities still allow the officer's conduct to be an "act of duty." ■

Disability benefits

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had detrimentally relied upon the actions of Trustee Bryant in believing that the information request form was sufficient.

Nevertheless, the Board dismissed Keeling's disability claim for lack of jurisdiction, finding that he had not applied for disability benefits while still employed as a police officer. Furthermore, the Board found that the legal doctrine of "equitable estoppel" regarding Keeling's detrimental reliance did not apply to his application since Keeling did not demonstrate that Officer Bryant's actions were affirmative acts on behalf of the Board of Trustees.

Keeling then filed for administrative review. The trial court ruled in his favor, finding that the Board was unable to deny jurisdiction. The Board appealed the lower court decision to the Illinois Appellate Court.

> ***By his own admission, Keeling had specifically been told that he needed to file an application for disability benefits.***

The Appellate Court first noted that it was clear that in order to receive a line-of-duty disability pension, pursuant to Section 3-114.1 (a) of the Illinois Pension Code, an individual must be a police officer. Moreover, previous case law has determined that, as a matter of statutory construction, one must file an application for disability benefits while still employed as a police officer. Thus, the court needed to determine whether the information request form that was filed while Keeling was still employed constituted an "application" for disability benefits.

Initially, the court noted that Keeling filed the designated application form after he had resigned from the police department. Although he had filed the information request form while he was still employed, that form was, at best, an application for information. Accordingly, the Board's conclusion that it lacked jurisdiction to consider Keeling's application for disability benefits was not against the manifest weight of the evidence.

But what about the question of "equitable estoppel"? Here, the court noted that the doctrine of equitable estoppel may be applied against a public body only under compelling or extraordinary circumstances. Furthermore, in order to prevail, an aggrieved party must prove three things: (1) the public body affirmatively acted; (2) its act induced the aggrieved party's substantial reliance; and (3) the aggrieved party substantially altered its position due to justifiable reliance.

In this case the evidence showed that Keeling failed to overcome the strong presumption against applying equitable estoppel against a public body, First, Keeling did not identify any affirmative act by the Board. On the contrary, Keeling testified that he met with Officer Bryant in Bryant's capacity as union president and not in his capacity as a Board trustee. Furthermore, the acts of a ministerial officer, such as Bryant, are not necessarily the acts of the public body. Thus, Bryant's act of tendering the information request form was not attributable to the Board.

Moreover, even assuming that Bryant's actions constituted affirmative acts of the Board, Keeling also failed to show that he justifiably relied upon those actions. By his own admission, Keeling had specifically been told that he needed to file an *application* for disability benefits.

Keeling's fellow officers, the police union's attorney, as well as the Board's attorney, all had told him that he needed to file an application. Therefore, Keeling did not demonstrate that he had been misled in any manner such that he could justifiably assert equitable estoppel.

As the court explained:

> The Board adopted a disability application form that Keeling has not challenged as being unreasonable. Yet, Keeling did not file that application while employed as a police officer. Thus, the Board properly found Keeling's application was untimely. Even assuming that Keeling subjectively misunderstood what needed to be done to preserve his claim, no affirmative act of the Board caused that misunderstanding and the doctrine of equitable estoppel did not apply.

A word to the wise: when applying for disability benefits be sure to file the proper application form with the Board while still employed; otherwise, the Board lacks jurisdiction to consider a request for disability benefits. ■

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