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Rare court decision reversing board's decision illuminates need for IMEs

by Michael B. Weinstein

Trustees of police and firefighter pension funds are well aware of the detailed procedures that must be followed with respect to the consideration of an application for disability benefits. Specifically, a disability pension cannot be awarded without an applicant submitting to an examination by three (3) physicians selected by the fund's board of trustees. (*See* 40 ILCS 5/3-115 and 4-112)

However, not all Illinois public pension funds require such examinations. A recent Illinois appellate court decision, *Hadler v. Illinois Municipal Retirement Fund*, 2018 IL App (2d)170303, highlights the pitfalls when such examinations are not part of the process.

Katherine Hadler was a member of the Illinois Municipal Retirement Fund (IMRF) with over 26 years of creditable service. In 2012, Ms. Hadler began experiencing pain in her right foot and ankle. The pain became so intense that it prevented her from working as an engineering technician for the Village of Rantoul. In fact, she was unable to return to work after having bunion surgery on her foot in November 2012. Subsequently, Ms. Hadler applied for, and received, temporary disability benefits from IMRF. Those benefits expired in June 2015 and she then applied for total and permanent disability benefits. [1]

As it turned out, her treating physicians diagnosed her condition as Complex Regional Pain Syndrome (CRPS), a chronic and debilitating condition believed to be caused by damage to, or malfunction of, the peripheral and central nervous systems. Ultimately, one of her physicians, Dr. King, found her to be totally and permanently disabled due to her CRPS and advised IMRF of his conclusion by completing the applicable IMRF disability form.

Nevertheless, IMRF staff denied Ms. Hadler's application for total and permanent disability benefits, relying upon a review of her medical records by their medical consultant, Dr. Rao. Ms. Hadler appealed the denial to the IMRF Board of Trustees. A hearing was subsequently held before the Board's Benefit Review Committee.

After hearing from Ms. Hadler and reviewing the initial staff report; additional materials submitted by both Dr. King and Ms. Hadler (including an administrative law judge's decision granting her Social Security disability benefits); a vocational opinion submitted by Allegiant Managed Care (Allegiant); and Dr. Rao's opinion. Thereafter, the Committee recommended that the full Board of Trustees uphold the staff decision. This recommendation was later adopted by the full Board. Ms. Hadler timely filed an administrative review complaint contesting the Board's decision denying permanent disability benefits.

The trial court affirmed the administrative decision, finding that the

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Sworn dispatchers must meet training requirements to participate in SLEP

by Meganne Trela

The Fifth District Appellate Court in Illinois recently held that deputy sheriffs serving as dispatchers had to meet the training requirements set forth by the Illinois Law Enforcement Training Standards Board in order to be considered "sworn" officers, and not civilians, for pension participation purposes in *Vick v. Wylie*, 2018 IL App (5th) 160520.

The court concluded that sworn deputy sheriff dispatchers in Williamson County who were not completing the training requirements promulgated by the Board should be removed from the Sheriff's Law Enforcement Personnel pension fund (SLEP) (40 ILCS 5/7-109.3) and placed instead into the Illinois Municipal Retirement Fund (IMRF) as civilian employees (40 ILCS 5/7-101 *et seq.*).

In November of 2014, Williamson County Sheriff Bennie Vick sent a memo to the then sworn dispatchers, informing them that the Illinois Law Enforcement Training Standards Board determined that they did not qualify as sworn officers because they did not complete the Board-required training. Accordingly, the Williamson County Sheriff no longer permitted the dispatchers to carry firearms, wear uniforms, receive a uniform allowance, or participate in SLEP.

Shortly thereafter, Vick filed a complaint for declaratory judgment seeking a determination that the dispatchers were not entitled to participate in SLEP, and

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Occupational diseases treated differently by the Illinois Pension Code and the Illinois Workers' Compensation Act

by Ryan Morton

Public safety employees in Illinois rely on multiple safety nets in the event they contract an occupational disease, an illness or harmful condition arising directly from the workers' employment exposure to hazardous conditions to which the public is not typically exposed. Depending on the circumstances, the Workers' Compensation Act (820 ILCS 305/1 *et seq.*) ("WCA"), the Workers' Occupational Diseases Act (820 ILCS 310/1 *et seq.*) ("WODA"), and the Illinois Pension Code (40 ILCS 5/1-101 *et seq.*) (the "Code") all provide benefits to employees stricken with an occupational disease or injury. However, the qualifications and benefits differ among the three statutes.

One of the initial differences is the timeframe in which an employee must file a claim. Under the WCA, employees only have 45 days to notify their employer about an accident. That extends to 90 days for exposure to radiation. On the other hand, an employee can be compensated under WODA if a disabling disease develops within two years of the employee's last exposure to the hazardous causes. The Code, however, sets no time limit, as long as the disease developed or manifested during a firefighter's or police officer's employment and the employee is still an "active" (not retired) employee. (See *DiFalco v. Board of Trustees of the Firemen's Pension Fund of the Wood Dale Fire Protection District*, 122 Ill. 2d 22 (1988))

Under both the WCA and WODA, many medical conditions affecting firefighters, EMTs, and paramedics are automatically presumed to have been caused by the hazards of their occupation, directly or indirectly. (820 ILCS 305/6(f)) That means the employee would not have to prove entitlement to workers' compensation, unless the presumption was challenged by an employer pointing to another cause. The conditions covered include bloodborne pathogens, heart conditions, and hearing loss. This presumption applies only to those employees who have been working in that capacity for at least five years when the claim is filed.

The Code is not as generous with its presumptions for occupational diseases. A firefighter with five years or more of creditable service is eligible for an occupational disease disability pension for heart disease, stroke, tuberculosis, and any disease of the lungs or respiratory tract. However, the employee must prove that the disease resulted from service as a firefighter, and that the employee is unable to perform his or her duties in the future. The cause of those conditions is not presumed. (40 ILCS 5/4-110.1)

However, the Code does include one *rebuttable* presumption for firefighters - for cancer, as long as other additional conditions are met. The cancer must develop or manifest while the firefighter is in active service, and the cancer must also be a type that may be caused by exposure to heat, radiation, or known carcinogens. If all those conditions are met, the pension board must presume the cancer arose as a result of firefighting, unless that presumption is successful rebutted. (40 ILCS 5/4-110.1)

Generally, police officers do not encounter the same unique occupational hazards that firefighters do, and as a result, occupational disease benefits rarely apply to them. Under the Code, however, police officers who work in a combined municipal police and fire department, and who regularly perform firefighting duties, are eligible for a disability pension under the same restrictions as firefighters. (40 ILCS 5/3-114.6) Police officers may also qualify for benefits if they suffer a heart attack or stroke, as long as it is the result of the performance and discharge of police duty. (40 ILCS 5/3-114.3)

The statutes also differ financially. Under the Code, an occupational disease disability pension is worth either 65% of the employee's salary at the time the employee was removed from payroll or 100% of the employee's pension upon retirement, whichever is greater. Under the WCA, the formula is more complicated, as the employee collects two-thirds of his or her average weekly earnings for a total disability. The WODA follows the same system but adds overtime earnings into the calculation.

Of course, a major difference are the types of payments available. The Code provides only one type of duty-disability pension, for employees who are unable to work because of their disability. Under the Code, it is "all or nothing." The WCA and WODA, though, offer degrees of benefits. Temporary Partial Disability, Permanent Partial Disability, Temporary Total Disability, and Permanent Total Disability are all options depending on the severity of the injury or disease. Under workers' compensation, claimants also can receive payment for medical expenses. If the occupational disease leads to death, all three statutes do provide for surviving spouses and minor children.

Although there are multiple avenues through which an employee can collect benefits, those options are not compounded. The Code provides that benefits payable under the Code must be reduced based on benefits available under the other statutes for the same disease or injury. (40 ILCS 5/3-114.5 and 40 ILCS 5/4-114.2) Importantly, only *benefits* from those

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Sworn dispatchers

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instead were entitled to participate in IMRF. The defendants (sworn dispatchers affected by the determination) challenged the complaint.

The trial court determined that (1) a properly trained and sworn deputy sheriff could be assigned dispatching duties; (2) the Board training requirements must be met to serve as a sworn deputy sheriff, and to perform the statutory powers of a deputy sheriff; and (3) civilian employees were not eligible to participate in SLEP. Accordingly, the trial court held that the dispatchers at issue could not be considered sworn deputy sheriffs eligible to participate in SLEP.

On appeal, the dispatchers did not challenge the determination that civilian employees were precluded from participating in SLEP; instead, they asked the court to consider whether they could legally be considered sworn deputy sheriffs without the Board training. The dispatchers argued that if they could be considered sworn employees, then the Fraternal Order of Police Labor Union to which they belonged would be able to challenge the change as a discretionary decision.

The dispatchers argued that their job description did not fall under the Board's guidelines under the Illinois Police Training Act (50 ILCS 705/1 *et seq.*). The Act does not specifically mention telecommunicators, but does define law enforcement officers as "any police officer of a local governmental agency who is primarily responsible for prevention or detection of crime and the enforcement of the criminal code, traffic, or highway laws of this State." (50 ILCS 705/8.1(a)) The dispatchers reasoned that they were not "law enforcement officers" as defined under the Act.

However, the court determined that even if the dispatchers could not be considered law enforcement officers, the Act gives the Board the explicit responsibility to set standards for law enforcement support personnel. Further, the court held that the dispatchers could reasonably be considered law enforcement support personnel and subject to the Act.

The dispatchers additionally argued that the Illinois Counties Code did not place specific requirements for training on deputy sheriffs (55 ILCS 5/1-1001 *et seq.*). However, the court determined that the Illinois Counties Code provides that deputy sheriffs are to be "duly appointed and qualified." To be qualified, the deputy sheriff would need to meet the training requirements of the Board. The court reasoned that the Illinois Counties Code enumerated the powers of deputies and noted that deputies "may perform any and all of the duties of the sheriff, in the name of the sheriff, and the acts of such deputies shall be held to be acts of the sheriff." Thus, deputy sheriffs were required to complete the required Board training.

As a result, the appellate court affirmed the decision of the trial court, holding that to be considered sworn deputy sheriffs, the defendants would need to meet the training requirements of the Board. Thus, the deputy sheriffs performing dispatch work and not meeting the Board training requirements were civilian employees and could not participate in SLEP.

It is important to make sure employees are properly classified and participating the in the correct public pension plans from the start of their employment. If you have questions determining the appropriate employee classification or the applicable pension plans for your employees, contact your attorney. ■

Occupational diseases

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other statutes are used to reduce – or offset -- pension disability or survivor's benefits. The costs of medical services, remedial treatment, and certain medical equipment recovered under the WCA are not subtracted from pension benefits.

Pension boards should also note the interplay between the WCA and the Code. If a disability pension is denied to a firefighter, the employee can still seek workers' compensation, because the parties are different (the pension fund, versus the fire protection district or municipality), as are the benefits sought. (*City of Chicago v. Illinois Workers' Compensation Com'n*, 2014 IL App (1st) 121507 WC) However, certain questions within those claims cannot be argued again if the issues are identical in both venues. For example, when the Workers' Compensation Commission determined that a specific arrest caused a police officer's injury, the pension board no longer needed to consider that issue, nor could it. (*Village of Alsip v. Portincaso*, 2017 IL App (1st) 153167) Since the issue had already been decided, it could not be relitigated. However, if there are significant issue that have not been considered previously, such as whether an injury occurred during an "act of duty," then the claims are not precluded. (*Demski v. Mundelein Police Pension Board*, 358 Ill. App. 3d 499 (2nd Dist. 2005)

In summary, the provisions of Illinois' various laws regarding disability compensation make it difficult to fully understand the concept, even for experienced pension board trustees. ■

Rare court decision

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medical evidence indicated that Ms. Hadler could sit for extended periods of time and there were sedentary occupations available for which she was qualified. In so holding, the trial court adopted the conclusions of Allegiant and Dr. Rao that Ms. Hadler had not demonstrated that she was unable to perform "any gainful activity" (the statutory standard used to determine eligibility for total and permanent disability benefits).

On further appeal, the Illinois Appellate Court, Second District, reversed. Initially, the appellate court noted that the standard of review was the "manifest weight of the evidence" standard since the parties "essentially dispute whether the facts support the Board's determination that the plaintiff is able to engage in any gainful activity."

Nevertheless, after considering both the statutory requirement, as well as IMRF's administrative rule defining "gainful activity," the appellate court unanimously held that the decision of the Board of Trustees was against the manifest weight of the evidence and, therefore, must be reversed.

Initially, the court noted that all three of Ms. Hadler's treating physicians concluded that she was permanently disabled and unable to return to work. On the other hand, Dr. Rao, the IMRF medical consultant, never treated Ms. Hadler. Moreover, he never explained the basis for his opinion. Indeed, even after additional materials were submitted by Ms. Hadler, Dr. Rao "offered no explanation as to how, with all the limitations set forth by the plaintiff's treating physicians, the plaintiff could perform any gainful activity. Further, he offered no reasons why the plaintiff's treating physicians' opinions should be discounted."

Furthermore, the Allegiant report was also insufficient to support the Board's determination since the case manager "assumed" that Ms. Hadler could perform sedentary work. Once again, the court pointed out that the case manager never directly spoke to, much less saw, Ms. Hadler. Nor was there any indication that the case manager had reviewed Dr. Rao's opinions or even spoke to him. Finally, the report was discounted since Ms. Hadler's work limitations "were not all considered." Thus, while acknowledging that the record on appeal contained evidence that could support the Board's decision, that evidence lacked a reliable basis in fact.

The court's conclusion can be summarized in the following quotation from its opinion: "In the present case, the plaintiff offered opinions from three experts. All of her experts had examined and treated her. The Board rejected those opinions and instead relied upon the opinions of the Allegiant case manager and Dr. Rao, neither of whom had ever met the plaintiff."

Thus, we see the importance of the three-physician IME requirement found in Articles 3 and 4 of the Illinois Pension Code. For in the eyes of this court, there can be no substitute for the actual physical examination(s) of an applicant for long-term disability benefits.

On a final note, since this decision was rendered, IMRF has implemented, on a limited basis, an examination process for both physical and psychiatric disabilities. However, the examinations are limited to those application for which an appeal to the Board's Benefit Review Committee has been requested. Thus, the vast majority of disability applications continue to not include an actual examination by IMRF medical consultants. ■

[1]IMRF members are eligible for two types of disability benefits: temporary benefits that can last as long as thirty (30) months; and total and permanent disability benefits that can last until an individual reaches the age at which full Social Security benefits are payable, or five years after the employee becomes disabled, whichever is later. (See 40 ILCS 5/7-147 and 7-150)

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