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PSEBA proof requirements reaffirmed by court

by Ericka J. Thomas

The Second District Appellate Court recently took the opportunity to reaffirm the standards of proof required for a firefighter or police officer to qualify for lifetime health insurance benefits under the Public Safety Employee Benefit Act (820 ILCS 320/10) ("PSEBA") in *Village of Vernon Hills v. Heelan*, 2014 IL App (2d) 130823.

PSEBA provides health insurance for life to firefighters or police officers who suffer catastrophic injuries or die while responding to an emergency, as well as their spouses and dependents. Illinois courts have consistently held that if a fire or police pension board awards an applicant a line of duty disability pension, then such a finding equates to a determination that the pensioner suffered a "catastrophic injury" under PSEBA.

However, Illinois courts have also made it clear that a police officer or firefighter is not guaranteed PSEBA benefits simply because he or she is awarded a line of duty disability pension. A reviewing court is required to closely consider the facts giving rise to the injury to determine whether the injury occurred during the firefighter's or police officer's response to what is reasonably believed to be an emergency.

The Illinois Supreme Court has specifically defined the term "emergency" as used in Section 10(b) of PSEBA, stating: "[T]he plain and ordinary meaning of the term 'emergency' in section 10(b) is an unforeseen circumstance involving imminent danger to a person or property requiring an urgent response. To be entitled to continuing health coverage benefits under section 10(b), the injury must occur in response to what is reasonably believed to be an unforeseen circumstance involving imminent danger to a person or property requiring an urgent response." (*Gaffney v. Board of Trustees of the Orland Fire Protection District*, 2012 IL 110012)

In *Heelan*, the Second District Appellate Court affirmed an award of PSEBA benefits to an injured police officer. The facts of the case indicate that the police officer was awarded a line of duty disability pension by the Vernon Hills Police Pension Fund for a permanent hip injury that the officer suffered when he slipped on a patch of ice responding to a "panic call alarm." Despite being awarded a line of duty disability pension, the Village of Vernon Hills contested that it was required to award the officer PSEBA benefits and filed suit requesting a declaratory judgment on the matter in Lake County Circuit Court.

The Village unsuccessfully contested the clear line of Illinois cases that hold that the legislature intended the

Continued on page 4

Court reverses board's denial of benefits where it clearly disregarded the medical evidence

by Laura A. Weizeorick

A pension board's denial of disability benefits for a firefighter's back injury was recently reversed by the court, where the pension board clearly disregarded the findings of all the physicians in the matter and instead inserted its own medical opinion to support its decision.

In *Scepurek v. the Board of Trustees of the Northbrook Firefighters' Pension Fund*, 2014 IL App (1st) 131066, Gabriel Scepurek injured his back while performing CPR on a patient. Scepurek felt his back tightening while crouched over the patient to perform chest compressions, and felt excruciating back pain when he stood up. Scepurek was unable to finish his shift and was transported to a hospital emergency room.

Despite a course of pain medication, muscle relaxants, steroid injections and physical therapy, he was afforded only temporary relief. A functional capacity evaluation was ordered and based on its lifting restriction of thirty-two pounds, his treating orthopedic physician found him unable to return to work.

Scepurek then obtained a second orthopedic opinion, which also concluded

Continued on page 2

Court reverses board's denial

Continued from page 1

that he was unable to return to work. He was diagnosed with a left L5-S1 acute disc herniation, and after eight months, was found to be at maximum medical improvement. His treating physician issued a written report finding him unable to return to work due to the low back injury he sustained while performing CPR. Scepurek applied for a line of duty disability.

The Board of Trustees of the Northbrook Firefighters' Pension Fund selected three physicians to perform independent medical evaluations of Scepurek. All three IME physicans issued reports and concluded that Scepurek was permanently disabled as a result of his job duties. All three IME physicians also testified before the Board. Despite the unanimous conclusions reached by the three IME physicians and two treating physicians that Scepurek was permanently disabled as a result of his on the job injury, the Board concluded that the plaintiff's injury, although permanent, was not caused during the line of duty.

The circuit court affirmed the Board's decision, and Scepurek appealed. Although the appellate court cannot reweigh evidence or make an independent determination of the facts, it found that the Board's decision was against the manifest weight of the evidence as it lacked any support in the record. The court found it significant that all the physicians who rendered opinions in the case were in agreement that Scepurek was permanently disabled from an on-the-job injury, that the plaintiff's back problems followed immediately upon his administration of CPR, and that he never returned to work.

The court found the Board's conclusion to the contrary totally unrealistic and defying common sense. The Board failed to individually evaluate the conclusions of each doctor and summarily disregarded all the medical opinions and evidence presented *in toto*. The Board instead rendered its own medical opinion that Scepurek's disability was caused solely by degenerative changes. The court reasoned that if it upheld the Board's decision, then no older firefighter/paramedic who had age-related degenerative skeletal changes would be able to establish an on-the-job injury.

The court also refused to place credence in the Board's finding that Scepurek was not credible. Although credibility determinations are generally within the province of the Board, the court found the Board's conclusion, which was based on the plaintiff's "courtroom demeanor" without identifying any significant contradictions or inconsistencies between his testimony and the medical evidence presented -- could not be upheld. The court highlighted the fact that the Board had relied on the plaintiff's statements for its disability determination. The Board's inconsistent and piecemeal handling of the plaintiff's statements, which were "inextrictly intertwined" as to the onset and permanency of his injury, were improper.

Accordingly, the appellate court found there was no medical evidence or testimony in the record to support the Board's conclusion that Scepurek had recovered from the back injury he sustained while performing CPR so as to exclude the incident as a contributing factor for his permanent disability. The court therefore reversed the Board's decision to deny the plaintiff his duty-related disability benefits.

The *Scepurek* decision clearly admonishes pension boards to base their decisions on the record before them, and not to insert their own assumptions and conjectures into their findings. Pension boards do not have to agree with all the medical opinions provided, or believe all the testimony provided by the applicant, but they must have some objective support for their conclusions to the contrary. Written findings strongly tied to the medical evidence and testimony provided in the record have the best chance of being upheld by a court on appeal. ■

Ottosen Britz to participate in NIAFPD 22nd Annual Conference

The Northern Illinois Alliance of Fire Protection Districts (NIAFPD) will host its annual conference on February 7-9, 2015 at the Westin in Lombard. Sixteen hours of pension trustee training will be available during the three-day conference. Pension training will include: ***Ericka Thomas & Vladimir Shuliga*** - "New Tools for Fixing Pension Benefit Mistakes." ***Carolyn Welch Clifford*** - "Recover from Disability: Termination or Return to Service?" ***David Zafiratos*** - "Real-Life Ethical and Fiduciary Challenges/Risks for Trustees." ***Steve DiNolfo & Shawn Flaherty*** - "Handling Questionable Health Conditions at the Time of Hire."

To register - www.niafpd.org

Court agrees with board's decision to deny duty disability benefits to detective who suffered a stroke

by Meganne Trela

A court recently affirmed a police pension board's decision to deny a police officer a disability pension, finding that the officer failed to prove that his stroke was a result of the performance of his duties as a police officer, in *Swanson v. Board of Trustees of the Flossmoor Police Pension Fund*, 2014 IL App (1st) 130561.

In *Swanson,* the detective had reported on July 30, 2009 that he had trouble sleeping because he was upset and angry over a performance evaluation. The next day Swanson went to work but returned home due to numbness in his arm and a drooping lip. He went to the hospital where it was determined that he suffered a stroke. Swanson subsequently returned to duty. Shortly thereafter, he again experienced symptoms of a stroke on September 30, 2009, while attending a training session on civil litigation involving police officers. Swanson was taken to the hospital and did not return to work.

In December of 2009, Swanson applied for a disability pension under three theories: (1) a 65% pension for a line of duty disability under Section 3-114.1 (40 ILCS 5/3-114.1); (2) a 65% pension by reason of having a stroke in the line of duty (40 ILCS 5/4-114.3); or (3) a 50% pension for a non-duty disability (40 ILCS 5/3-114.2). As required by the Illinois Pension Code, Swanson was evaluated by three physicians; Dr. Kessler, Dr. Obolsky and Dr. Munson. The Board asked the physicians to address whether Detective Swanson's disability was a direct result of his on-duty activities.

Dr. Kessler concluded that Swanson was disabled from service, but did not address the causation element. Dr. Obolsky found that Swanson was disabled for full duty but stated that he did not have the requisite knowledge to opine on the connection of Swanson's duties as a police officer and his strokes. Dr. Munson found Swanson disabled but stated that there was no evidence that Swanson's stroke was the result of his on-duty activities. Dr. Munson additionally noted that Swanson's stroke did not have a clear "etiology" or cause.

Swanson had a history of hypertension and obesity, and did not regularly take his prescribed medication for hypertension. As a result, the Board determined that while he was disabled, he was not disabled by reason of the performance of his duties as a police officer. Thus, Swanson was awarded a non-duty disability pension. Swanson appealed the decision to the Cook County Circuit Court, and the decision was affirmed.

At the appellate court level, the First District determined that the question of whether the record supported the Board's denial of the Section 3-114.3 disability pension was a question of fact and would not be disturbed by the court unless it was against the manifest weight of the evidence. The court specifically noted that the determination was not whether the court would have reached the same result but rather whether there was sufficient evidence in the record to support the determination.

The appellate court determined that the record in the matter supported the finding that Swanson was not disabled by reason of the performance of his duties as a police officer. The court found that it was the Board's function to resolve the conflicts in the medical evidence. In doing so, the Board found Dr. Munson's opinion credible and relied upon that opinion in its causation finding.

Interestingly, on appeal Swanson argued that the Board erred when it requested opinions on causation from the three IME physicians, arguing that under Section 3-115 of the Illinois Pension Code, the IME physicians should only render opinions on whether the applicant is disabled.

Section 3-115 provides in relevant part: "A disability pension shall not be paid unless there is filed with the board certificates of the police officer's disability, subscribed and sworn to by the police officer if not under legal disability, or by a representative if the officer is under legal disability, and by the police surgeon (if there be one) and 3 practicing physicians selected by the board. The board may require other evidence of disability." (40 ILCS 5/3-115)

The court held that Swanson forfeited his objection to the causation opinions when he failed to object to the introduction of the reports at the hearing.

This case serves as an important reminder that it is the pension board that makes credibility determinations and resolves conflicts in the evidence. As long as the board's determination is supported in the record, a reviewing court will not disturb a board's findings. ■

PSEBA proof

Continued from page 1

term "catastrophic injury" to be synonymous with an injury resulting in the award of a line of duty disability pension under the Illinois Pension Code. The Village sought to conduct extensive discovery on whether the officer had actually suffered a "catastrophic injury" for purposes of PSEBA.

However, the trial court refused to allow such discovery to occur, holding that Illinois law was clear that the pension board's determination that the applicant was entitled to a line of duty disability pension established that the officer had suffered a "catastrophic injury" for purposes of PSEBA. Since the Village had already acknowledged that the officer's injury had occurred while responding to an emergency, the trial court awarded PSEBA benefits to the officer. The Second District Appellate Court affirmed this award.

The Second District used the *Heelan* case to reaffirm a line of Illinois cases that holds that a pension board's award of a line of duty disability pension is synonymous with a finding of "catastrophic injury" under PSEBA. The Second District agreed with the trial court's refusal to allow the Village to conduct further discovery on the issue since the pension board's decision was conclusive on whether there was a "catastrophic injury."

However, the Second District's opinion was not unanimous. In a long dissent, Justice McLaren was of the opinion that the Village had been deprived of due process in the matter because it was never given the opportunity to present evidence or to be heard on whether the officer's injury amounted to a "catastrophic injury."

Justice McLaren noted that the majority opinion blindly followed the line of Illinois case law but did not explain why the findings of the pension board can or should be binding on a trial court in a separate proceeding with different parties regarding matters that the pension board had no statutory authority to decide.

In an interesting development, the Illinois Supreme Court granted the Village's Petition for Leave to Appeal on November 26, 2014. It remains to be seen whether the Illinois Supreme Court will use this case to reaffirm the current state of the PSEBA law or, as Justice McLaren opined, allow municipalities the opportunity to present their own evidence on the issue of whether the injury is "catastrophic."

In the meantime, it is likely that municipalities will continue to keep themselves apprised of and, in some cases, seek to become involved in pension proceedings if there is a possibility that the applicant may seek PSEBA benefits in the future. Under the current state of the law, the pension hearing is the only opportunity for municipalities to present evidence on whether the injury is "catastrophic." ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, Ltd.'s newsletter, ***Legal Insights for Pension Boards,*** is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.
1804 N. Naper Boulvard, Suite 350
Naperville, Illinois 60563
630.682.0085
www.ottosenbritz.com
Carolyn Welch Clifford, Editor cclifford@ottosenbritz.com