COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2292 **Cir. Ct. No. 2011CV16406**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

DEWREAL M. FORD,

PLAINTIFF-RESPONDENT,

V.

CITY OF MILWAUKEE EMPLOYEES' RETIREMENT SYSTEM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. This is an appeal of an order of the circuit court reversing a decision of the Milwaukee Employees' Retirement System Annuity and Pension Board ("the Board"). The Board denied duty disability benefits to Dewreal M. Ford under MILWAUKEE CITY CHARTER § 36-05-3-a. After an

independent review of the record, we conclude that there is insufficient evidence to support the Board's decision. We affirm the circuit court.

PROCEDURAL HISTORY

¶2 In September 2010, Ford applied for duty disability retirement benefits, stemming from a thumb injury incurred on May 31, 2007, while he was on duty as an employee of the sanitation department. In his application, Ford stated that he injured his left thumb while "pulling a garbage cart," resulting in a condition known as Complex Regional Pain Syndrome (CRPS). Pursuant to MILWAUKEE CITY CHARTER § 36-05-3-a,[1] Ford's application was reviewed by a medical council consisting of three physicians. The council referred Ford to Dr. Mark Aschliman, an orthopedic surgeon, for an evaluation of Ford's condition and for an opinion as to whether Ford was permanently and totally disabled from his job as a result of the May 31, 2007 injury. The council certified to the Board that Ford was not permanently and totally incapacitated as a result of a work-related injury. Based on one of Dr. Aschliman's reports, the Board denied Ford's application for duty disability retirement. Pursuant to WIS. STAT. § 68.09 (2009-10),[2] Ford sought review of the Board's decision. An independent reviewer reviewed Ford's file and affirmed the decision of the Board. Ford appealed the

[1] MILWAUKEE CITY CHARTER § 36-05-3-a provides:

> Any member in active service who shall become permanently and totally incapacitated for duty as the natural and proximate result of an injury occurring at some definite time and place while in the actual performance of duty shall, upon filing a request for retirement with the board on a form provided by the board for that purpose, be entitled to duty disability retirement allowance.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

decision and a *de novo* appeal hearing was conducted pursuant to WIS. STAT. § 68.11. Ford testified at the hearing and multiple medical records, including reports from Ford's personal physicians and Dr. Aschliman, were submitted into evidence. An independent hearing examiner affirmed the Board's decision, finding that Ford's condition resulted from underlying osteoarthritis, not his May 31, 2007 injury. Ford then sought *certiorari* review of the Board's decision to the circuit court. The circuit court reversed the Board's decision, finding that the Board did not rely on substantial and credible evidence when it relied solely on one of Dr. Aschliman's reports, which was inconsistent with his prior reports on the same injury, and contrary to all other medical evidence in the record. The City of Milwaukee appeals.

BACKGROUND

¶3 According to facts established at Ford's appeal hearing, Ford was hired by the City of Milwaukee as a driver/loader in 2004 and was enrolled in the Employee's Retirement System. Ford filed an application for Duty Disability Retirement in September 2010, in which he described an incident that occurred on May 31, 2007, when he jammed his left thumb while grabbing or pulling a garbage cart from a garbage truck. Ford alleged that he developed Complex Regional Pain Syndrome, type I (CRPSI) as a result of his injury. Ford asserted that the injury rendered him unable to perform his job.

¶4 On June 1, 2007, the day after the injury, Ford sought treatment from Dr. Nancy Petro. Dr. Petro diagnosed a sprain and prescribed a thumb splint after x-rays of Ford's left thumb and wrist came back normal. After multiple visits with Dr. Petro, Ford continued to complain of pain. Dr. Petro referred Ford to Dr. Lewis Chamoy.

¶5 Dr. Chamoy saw Ford on June 19, 2007. Dr. Chamoy ordered additional x-rays, which showed no evidence of fracture, dislocation, or osteoarthritis. The x-rays did show a slight subluxation[3] of the first carpometacarpal joint. Ford returned to Dr. Chamoy because of continued pain. Dr. Chamoy performed surgery—a carpometacarpal joint debridement and capsulorrhaphy[4]—on August 29, 2007.

¶6 Although Ford returned to work in January 2008, he returned to Dr. Chamoy on January 8, 2008, complaining of increased pain in his left thumb. Ford was treated with a series of four steroid injections between January 2008 and April 2008. He returned to Dr. Chamoy again in June 2008, with complaints of increased thumb pain. An x-ray taken in June 2008 did not show any arthritic abnormalities and did not reveal any changes from the June 2007 x-ray.

¶7 After returning to work for a period of time, on July 28, 2008, Ford began to experience pain and numbness in his left hand, arm and shoulder while operating a street sweeper. Dr. Chamoy diagnosed Ford with CRPSI and recommended further surgeries. Ford underwent two additional surgeries in August and September of 2008.

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[3] "Subluxation" is defined as a "partial dislocation." *See Subluxation Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/subluxation (last visited July 1, 2013).

[4] "Debridement" is defined as "the usually surgical removal of lacerated, devitalized, or contaminated tissue." *See Debridement Definition.* MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/debridement (last visited July 1, 2013).

"Capsulorrhaphy" is defined as the "suture of a cut or wounded capsule." *See Capsulorrhaph Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/ capsulorrhaphy (last visited July 1, 2013).

¶8 In November 2008, the City hired Dr. Aschliman to review Ford's worker's compensation case and to determine the cause of Ford's ongoing pain, disability and surgeries. Dr. Aschliman examined Ford in November 2008. In his November 2008 report, Dr. Aschliman opined that Ford's May 31, 2007 injury was a "symptomatic aggravation of a pre-existing process for which surgery was undertaken" and that Ford's physical restrictions "relate to the 5/31/2007 industrial claim and subsequent surgery." Dr. Aschliman concluded that a "healing plateau has not yet been attained."

¶9 On January 23, 2009, Dr. Aschliman again examined Ford for the City because of continued complaints of pain. Ford was scheduled for another surgical procedure at the time of this visit. An x-ray taken at that time is reported to show spurring as well as subluxation of the first metacarpal and the base of the second metacarpal. Dr. Aschliman concluded that "[t]he 5/31/2007 event was a symptomatic aggravation of underlying osteoarthritis," that Ford's ongoing complaints "relate to the underlying physiology of Mr. Ford *and his industrial injury of 5/31/2007*." (Emphasis added.) Dr. Aschliman stated that the additional surgery was related to Ford's "work injury."

¶10 Ford underwent an additional surgery on January 28, 2009. His pain continued and he additionally reported numbness and tingling in his left hand. Ford returned to Dr. Chamoy, complaining of increased pain and additionally of skin discoloration. Dr. Chamoy ordered a bone scan, which revealed mild, post-traumatic arthritic changes of the first and second carpometacarpal joints. After the bone scan, Dr. Chamoy concluded that Ford was suffering from CRPSI.

¶11 On September 3, 2009, Ford was seen for the third time by Dr. Aschliman. The September 2009 report stated that "[o]n 5/31/2007, Mr. Ford had

an aggravation of underlying osteoarthritis. He subsequently underwent numerous surgical interventions. *The current condition of the left upper extremity does relate to that event to some degree*." (Emphasis added.) Dr. Aschliman concluded that Ford could not return to his regular job on a full-time basis. Dr. Aschliman later explained the inconsistency between this report and the previous reports as follows: "While it was opined that there had been a workplace aggravation of a pre-existing process on 5/31/2007 *this opinion was provided given a history of acceptance of this claim as compensable by the City of Milwaukee.*" (Emphasis added.)

¶12 A year later, in September 2010, Ford applied for Duty Disability Retirement. Ford was evaluated by Dr. Steven Donatello, who concluded that Ford was unable to lift, push or pull more than 10-15 pounds with his left hand. In a Practitioner's Report on Accidental or Industrial Disease for the Department of Workforce Development Worker's Compensation Division, Dr. Donatello concluded that this restriction was the result of CRPS, caused by the May 31, 2007, work injury. Dr. Donatello's report notes the "Date of Traumatic Event" as "5/31/2007." In response to the report's request to describe "the accidental event or work exposure to which the patient attributes his/her condition," Dr. Donatello cites to a note from Dr. Chamoy. The note states:

> [P]atient with pain in the left hand after the injury and surgery. The patient still has limited motion. He is still having pain. He has been treated by Dr. Todd Hill. He has found medication that makes him stable. I do not think he will be able to go back to hard, physical labor again.

When asked whether the accidental event "directly caused the disability [in question]," Dr. Donatello marked "yes." He did not answer whether the injury was caused by the "precipitation, aggravation and acceleration of a pre-existing

condition" but did indicate that Ford did not have a permanent disability prior to May 31, 2007. Dr. Donatello concluded that Ford was permanently disabled at a 20% rating because of his workplace accident.

¶13 Dr. Chamoy also completed a "Practitioner's Report." Dr. Chamoy also listed "5/31/2007" as the "Date of Traumatic Event," and cited to his notes stating that Ford was being treated for CRPS as a result of pain and complications from his injury.

¶14 On November 11, 2010, at the City's request, Ford was seen by Dr. Aschliman for a final time. In his report about that meeting, Dr. Aschliman stated:

> Dewreal Ford had a condition of osteoarthritis of the left thumb carpometacarpal joint articulation. At the worst he had a symptomatic aggravation of this condition in the workplace on a transient basis. At the least he had a simple manifestation of symptoms in the workplace. Relative to the effects and results of the 5/31/2007 occurrence *Mr. Ford recovered fully from the effects and results of that occurrence by 6/11/2007.*

(Emphasis added.) The report did not indicate why Dr. Aschliman thought Ford had recovered by June 11, 2007. In response to a letter from City Attorney Maurita Houren, Dr. Aschliman explained his November 2010 findings. He wrote:

> The 5/31/2007 event was not the direct cause of Mr. Ford's subsequent surgery. Mr. Ford had significant pre-existing carpometacarpal arthropathy of the thumb…. The impression now looking back is that Dr. Chamoy in my opinion undertook surgery in an attempt to allow Mr. Ford to continue working at his job. The inability of Mr. Ford to participate in heavy lifting related not to the workplace event or subsequent surgery but rather to the intrinsic physiology of Mr. Ford, himself.
>
> Both complex regional pain syndrome and reflex sympathetic dystrophy have clinical findings that are findings on physical examination that support the

> diagnosis. Mr. Ford never had evidence of any of these conditions on examination. While *there was a bone scan supportive of autonomic dysfunction or complex pain syndrome* that study must be interpreted in conjunction with physical findings. The *physical findings are critical to the diagnosis and Mr. Ford never demonstrated any evidence of such conditions*.[5]
>
> It is apparent … from having seen Mr. Ford several times that there was no significant industrial injury sustained on 5/31/2007.

(Emphasis added.)

¶15 The medical council denied Ford's application for duty disability retirement. The decision of the council was subsequently upheld by the Board. The Board found that "relative to the effects and results of the 5/31/2007 occurrence Mr. Ford recovered fully," and that there was no "objective physical evidence" to support a diagnosis of reflex sympathetic dystrophy or CRPS.

¶16 Pursuant to WIS. STAT. § 68.09, Ford sought review of the Board's decision. An independent reviewer upheld the Board's decision. Ford again appealed the decision pursuant to WIS. STAT. § 68.11. A *de novo* appeal hearing was held before Independent Hearing Examiner John Fiorenza. Only Ford testified at the hearing; the remainder of the evidence submitted at the hearing was documentary evidence, including Dr. Aschliman's November 11, 2010 report, as well as the reports of Ford's independent physicians. Relying exclusively on Dr. Aschliman's November 2010 report (saying Ford had healed from the May 31, 2007 injury by June 11, 2007), the examiner concluded that "[t]he incident of May

[5] While on the one hand Dr. Aschliman concedes that a bone scan supported Ford's CRPSI diagnosis, his report goes on to say that unspecified "physical findings" do not support the diagnosis. Dr. Aschliman does not state, however, what other "physical findings" were necessary to support Ford's diagnosis. Indeed a bone scan and evaluations conducted by other doctors did support the diagnosis.

31, 2007 aggravated [Ford's] pre-existing condition of osteoarthritis. His medical conditions after June 11, 2007 were not related to the[] May 31, 2007 incident" and thus Ford was "not permanently or totally incapacitated for duty as a natural or proximate result of the injury he sustained during the incident of May 31, 2007." The Board adopted the examiner's report in its entirety. This was the final determination denying duty disability benefits to Ford.

¶17 Ford sought *certiorari* review of the Board's decision. The circuit court reversed the Board's decision, concluding that the Board unreasonably relied solely on Dr. Aschliman's November 11, 2010 report, which contradicted his three previous reports, as well as all other medical reports on the record and physical evidence at the time of the injury and shortly thereafter. Dr. Aschliman's final report was not sufficient evidence upon which to base the Board's decision, making the Board's reliance on the report unreasonable. The City appeals. Additional facts are included as necessary to the discussion.

STANDARD OF REVIEW

¶18 "On the review of a judgment entered on certiorari, this court's function is to review not the judgment or findings of the [circuit] court but, rather, is to review the record of the administrative board to whom certiorari is directed." ***State ex rel. Harris v. Annuity & Pension Bd., Emps'. Ret. Sys. of the City of Milwaukee***, 87 Wis. 2d 646, 651, 275 N.W.2d 668 (1979). "Our review is limited to determining whether the agency kept within its jurisdiction, applied a correct theory of law, did not act arbitrarily, and made a reasonable determination under the evidence presented." ***Carey v. Wisconsin Ret. Bd.***, 2007 WI App 17, ¶10, 298 Wis. 2d 373, 728 N.W.2d 22.

¶19 In seeking *certiorari* review of the administrative decision, Ford argued that the Board's decision was unreasonable and was not based on the evidence. Both questions require us to determine whether the Board's decision is founded on sufficient evidence. *See* ***Harris***, 87 Wis. 2d at 651-52. "The sufficiency of evidence on review by common law certiorari is identical to the substantial evidence test used for the review of administrative determinations under [WIS. STAT.] ch. 227." ***Harris***, 87 Wis. 2d at 652. "Under this standard a court does not pass on questions of credibility, nor does it weigh the evidence. The test is whether the evidence reasonably supports the decision." ***Id.*** If we conclude that the Board's decision is not supported by sufficient evidence, we may overturn it. *Cf.* ***Village of Menomonee Falls v. Wisconsin DNR***, 140 Wis. 2d 579, 594, 412 N.W.2d 505 (Ct. App. 1987).

¶20 "Substantial evidence has been defined ... as 'that quantity and quality of evidence which a reasonable [person] could accept as adequate to support a conclusion.'" ***Gehin v. Wisconsin Grp. Ins. Bd.***, 2005 WI 16, ¶48, 278 Wis. 2d 111, 692 N.W.2d 572 (citation omitted). Substantial evidence must include something "more than 'a mere scintilla' of evidence and more than 'conjecture and speculation.'" ***Id.*** (citations and footnote omitted).

¶21 Keeping these standards in mind, we examine the record to determine whether there was substantial evidence to support the Board's decision. The record contains multiple medical records, including four reports by Dr. Aschliman, and reports by Ford's multiple treating physicians.

DISCUSSION

¶22 The issue on appeal is whether the Board's decision to deny Ford's duty disability retirement benefit application is supported by sufficient evidence in

the record. The Board based its findings solely on Dr. Aschliman's November 11, 2010 report. Because his three prior reports were all contrary to his stated facts and his conclusion in the November 11, 2010 report, we examine that report to determine whether it is based on sufficient evidence to be evidence on which the Board may reasonably rely.

¶23 Ford applied for duty disability benefits pursuant to MILWAUKEE CITY CHARTER §36-05-3-a. Section 36-05-3-a provides:

> Any member in active service who shall become permanently and totally incapacitated for duty as the natural and proximate result of an injury occurring at some definite time and place while in the actual performance of duty shall, upon filing a request for retirement with the board on a form provided by the board for that purpose, be entitled to duty disability retirement allowance.

¶24 The City argues that we should uphold the findings of the Board because: (1) Ford was not incapacitated as the result of the May 31, 2007 incident; (2) there is evidence in the record which supports the Board's finding that Ford fully recovered from the May 31, 2007 sprain; and (3) Board Rule XXI[6] allows the Board to rely upon medical records as substantive evidence. The City contends that Ford's claimed disability—CRPSI—was not naturally and proximately caused by his thumb injury on May 31, 2007. Rather, the City contends that evidence supports the Board's finding that Ford's May 31, 2007 work-place injury was simply a sprain that healed by June 11, 2007, and that Ford's long-lasting injury was actually caused by a pre-existing osteoarthritic

[6] Section 4(f) Board Rule XXI of the Employees' Retirement System of the City of Milwaukee: Rules and Regulations states: "Any medical or hospital report or record shall be admissible, and may be relied upon by the person conducting the hearing in making his/her recommendation to the Board, so long as it is provided to the other party at least five days prior to the hearing or stipulated to by the parties."

condition.[7] As we explain below, the record does not support a finding that on or shortly after May 31, 2007, Ford had an osteoarthritic condition.

¶25 The Board found that Ford sprained his left thumb in May 2007, while pulling a garbage cart and that he experienced continued pain after returning to work. However, the Board concluded that the continued pain "was not related to the May 31, 2007 incident." Relying exclusively on Dr. Aschliman's November 11, 2010 report, the Board found that: (1) Ford had osteoarthritis of the left thumb; (2) at the worst, Ford's condition was aggravated at the workplace; (3) at the least, Ford had a "simple manifestation of symptoms in the workplace"; (4) Ford fully recovered from the May 31, 2007 occurrence as of June 11, 2007; and (5) Ford's medical conditions after June 11, 2007 "were not related to the[] May 31, 2007 incident."

¶26 The City contends that Dr. Aschliman's November 2010 report was sufficient evidence for the Board's decision, although contradicted by all of his prior reports, because Dr. Aschliman's prior reports were made for Worker's Compensation purposes and thus the City had not yet asked him to consider whether the May 31, 2007 incident incapacitated Ford. Moreover, the City contends that Ford had not been diagnosed with CRPSI at the time of the prior reports, which the City claims explains any inconsistencies between the reports. We are not persuaded that because a doctor becomes aware that his patient is taking a different legal position than previously taken, the doctor is excused for expressing a later opinion which: ignores inconsistent existing physical evidence, relies on physical evidence that did not exist, and includes an opinion as to the

[7] At Ford's appeal hearing, the City did not dispute that Ford's May 31, 2007 injury occurred while he was on duty. The City's main argument was that Ford's CRPSI was not caused by the May 31, 2007 injury.

"cause" of the medical condition involved which is directly contrary to prior opinions expressed by the doctor regarding the same patient and the same events.

¶27 Only Dr. Aschliman's November 11, 2010 report supports the Board's decision. In that report, Dr. Aschliman stated that Ford had an underlying osteoarthritic condition and that the May 31, 2007 injury was a sprain that Ford had healed from by June 11, 2007. The 2010 report did not explain why Dr. Aschliman believed Ford had healed by June 11, 2007, when his November 2008 report concluded that Ford had not yet reached a "healing plateau" and that "*[a]t the present time the current condition of Mr. Ford relates to his initial industrial claim of 5/31/2007*." (Emphasis added.) In addition, in January 2009, Dr. Aschliman reported that Ford had pre-existing osteoarthritis, although the x-rays done contemporaneously with the initial treatment and the x-rays done in connection with Ford's surgeries made no mention of osteoarthritis. Nonetheless, in January 2009, Dr. Aschliman reported a causal connection between the workplace injury and Ford's ongoing pain that "relate[d] to the underlying physiology of Mr. Ford *and his industrial injury of 5/31/2007 and subsequent manifestation of complaints on 7/28/2008*." (Emphasis added.)

¶28 Dr. Aschliman's third report, issued in September 2009, differed from the previous reports by stating "the 5/31/2007 event was simply not a significant factor in the … left upper extremity of Mr. Ford." A letter Dr. Aschliman wrote to City Attorney Houren addresses the obvious and significant contradictions in his reports:

> Mr. Ford was last evaluated in this office on a worker's compensation basis for the City of Milwaukee on 9/3/2009. At this time questions were specifically asked regarding the 5/31/2007 occurrence…. At the time of [the November 2008 evaluation] *I was operating under the assumption that the City of Milwaukee had already accepted the 5/31/2007*

> *event as compensable. Given the over 2 year interval from the event in question and apparent acceptance of the condition by the City it would have been unrealistic of me to indicate that the 5/31/2007 event was not a workplace event.*

(Emphasis added; some formatting altered.) Dr. Aschliman's explanation makes it impossible not to conclude that he was basing his new medical opinion not on changed medical facts, but rather on his understanding that the City's legal view of Ford's injury had changed. A patient's change of legal position, real or perceived, cannot be substantial or significant evidence upon which to base a medical opinion.

¶29 Relying on our supreme court's decision in ***Gehin***, the City argues that Dr. Aschliman's November 2010 report can constitute substantial evidence for the hearing examiner's decision, thus the decision should be upheld. ***Gehin*** does not support the Board's reliance solely on Dr. Aschliman's November 2010 report. While Dr. Aschliman's report was properly admitted into evidence, "[p]roperly admitted evidence may not necessarily constitute substantial evidence." *See* ***id.***, 278 Wis. 2d 111, ¶52. Even the relaxed evidentiary rules that apply to administrative agency hearings do not allow agencies to rely "*solely* on uncorroborated hearsay in reaching its decision." ***Id.***, ¶56.

¶30 Here, the Board relied entirely on Dr. Aschliman's last report, ignoring his three prior diametrically contrary reports, and ignoring physical findings by the other treating physicians. Clinical reports from Drs. Petro and Chamoy show that Ford did not suffer from a pre-existing arthritic condition. X-rays evaluated by both doctors showed no arthritic changes, fractures, dislocations or "other acute osseous abnormalit[ies]." An evaluation conducted on June 4, 2008, by Dr. Richard Jochem, a radiologist, also indicated "no arthritic changes."

Dr. Donatello indicated that Ford's CRPSI was "directly caused" by the May 31, 2007 incident.

¶31 Dr. Aschliman's explanation for his contradictory report is based more on his understanding of Ford's legal position than on Ford's medical condition. Dr. Aschliman does not identify new medical evidence which supports his new conclusions. Dr. Aschliman's November 2010 report, therefore, cannot constitute substantial evidence in support of the Board's decision. Such an unsupported opinion cannot be sufficient evidence, and reliance thereon cannot be reasonable.

CONCLUSION

¶32 For the reasons explained above, we conclude that the Board did not rely on sufficient evidence when it denied Ford's duty disability retirement claim. We affirm the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.