

PENSION POINTERS



The Dishonest Applicant

By Carolyn Welch Clifford
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Editor's Note: Pension Pointers is a column provided for our members who also serve on the Fire Pension Board.

More than ten years ago, the Illinois Supreme Court stated, "Perhaps the most important function of a pension board is to ensure adequate financial resources to cover the Board's obligations to pay current and future retirement and disability benefits to those who qualify for such payments. *An important part of this responsibility involves the screening of unqualified or fraudulent disability claims, so that funds are not unfairly diverted to undeserving applicants.*" *Marconi v. Chicago Heights Police Pension Fund*, 225 Ill. 2d 497 (2007) (emphasis added).

From time to time, firefighter and police pension fund trustees are confronted with the evaluation of an application for disability pension benefits in which the applicant has credibility issues. Where the applicant's credibility issues are tied to objective inconsistencies in documentary evidence or witness testimony – and are noted specifically by an independent medical evaluating (IME) physician -- the board's task of weighing the evidence and making a determination as to how the credibility affects its resolution of these discrepancies is fairly straight-forward.

The courts have consistently held that credibility determinations are generally within the province of the board, and the board's determination is given deference on review. The reason for this deference is that the board – as the finder of the facts – actually observes the conduct and demeanor of witnesses, and as a result,

is in the best position to make credibility determinations. As the Illinois Supreme Court stated in *Marconi*, "Faced with this conflict of evidence, it was the Board's function, as the finder of fact, to assess the credibility of the documentary information and the testimony of the witnesses and to determine the appropriate weight to be given the evidence."

However, where the applicant's credibility concerns are *unrelated* to the issues to be determined by the board in evaluating the applicant's eligibility for the disability benefit – specifically, is the applicant disabled, and if so, was it caused by the duties of the job – these concerns can be problematic for boards. And this is particularly true when the IME physicians have found the applicant is disabled and/or the disability is caused by job duties.

For example, in *Scepurek v. Board of Trustees of the Northbrook Firefighters' Pension Fund*, 2014 IL App (1st) 131066, a pension board's decision to deny a firefighter's application for duty disability pension benefits was reversed. The board had determined that the applicant had fully recovered from an injury he received during an on-duty performance of CPR on a citizen and that it was not a contributing factor to his permanent disability. To make this conclusion, the board had improperly disregarded the opinions of all physicians who presented medical evidence and all documentary evidence – essentially rendering its own medical opinion that the applicant's disability was not the result of this on-duty injury.

The court noted that the board's findings did not explain how it could come to such a conclusion. Instead, the Board made findings that the plaintiff was not a credible witness, substituting its lay assumptions and engaging in conjecture to make its determination that the applicant's disability was not caused by duty-related injuries but rather was degenerative. The court concluded:

While credibility determinations are generally within the province of the Board, the Board cannot piecemeal tear apart a plaintiff's credibility on one issue while finding him credible on all other issues when plaintiff's same statements are supported by documentary evidence and are found credible by all medical personnel as in this case.

Sometimes a pension board will seek to rely upon an applicant's dishonesty or unscrupulous behavior in unrelated matters as a reason to find the applicant not credible in his or her disability application. Courts have uniformly denounced board determinations that have denied benefits based on such unrelated credibility issues.

In *Roszak v. Kankakee Firefighters' Pension Board*, 376 Ill. App. 3d 130 (3rd Dist. 2007), the Third District Appellate Court reversed the Board's denial of a firefighter's disability application, which the board had denied based on what it determined

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was the firefighter's lack of credibility. The Board found the firefighter had been evasive in answering questions about where he lived and worked and what he earned. The Board also believed the firefighter had magnified his symptoms, pointing specifically to his snorkeling vacation, surgery postponements, and failure to see a doctor for months. Although the firefighter had blamed this on worker's compensation and affordability issues, the Board concluded he was not credible and "pointed to his assets in the bank."

In reversing the Board's decision to deny the disability application, the court stated, "What all of these examples cited by the Board as adversely affecting applicant's credibility have in common are that they *do not directly relate to applicant's disability* stemming from the [injury.]. We cannot say that these examples cited by the Board resulted in damage to applicant's credibility as to his disability." (emphasis added). The court explained that the Board had conflated facts, and as a result, found the firefighter's responses to the Board's questioning at hearing did not detrimentally affect his credibility.

When a board's decision is based on determinations of credibility that are implausible, courts have made it clear that those decisions will be reversed. *Lambert v. Downers Grove Fire Department Pension Board*, 2013 IL App (2d) 110824 ("An agency's decision that is supported by some evidence, but is against the manifest weight of the evidence, cannot stand."). This is particularly true in the context of a disability application where a pension board has rejected the vast majority of the medical evidence.

Where does this leave pension boards who are confronted with information that an applicant for disability has not been forthcoming or completely truthful – or flat-out fraudulent – in his or her application for benefits? Where such information is brought to a pension board, the board should:

- Request the accusations of dishonestly be made in writing, with any relevant documentation – including videos and photographs -- included.
- Turn over such documentation to the pension board's attorney, who will

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determine whether the information is credible and relevant to the questions of disability and job-relatedness. If it is relevant, the documentation may be provided to the IME physicians for review ahead of the examinations of the applicant.

- If such accusations come to light after the IME examinations have occurred, the pension board and its attorney will need to determine whether the IME physicians will need to be provided the information for review in order to prepare addendum IME reports or to react to the information by testimony under oath at hearing.

It is not unusual for witnesses who profess to have information of wrongdoing to fail to produce such

evidence when pressed to provide it in writing. Furthermore, it is not unusual for witnesses who do offer specific information of wrongdoing to offer information that is unrelated – and irrelevant – to the core questions before the pension board regarding disability and job-relatedness.

Pension boards have an obligation to take allegations of fraud seriously (40 ILCS 5/1-135 and 4-138.5). But fraud itself – as a criminal matter – is serious and is not easily proven. Where an applicant for disability benefits has shown poor judgment or dishonesty in his or her life generally, it is more likely than not that such actions will not rise to a level of being relevant to the question of the applicant's credibility in the context of the disability application. ■

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