A Public Safety Law Firm
R&D
REIMER & DOBROVOLNY PC

Volume 17, Issue 2, April 2019

Legal and Legislative Update

Police Line of Duty Disability for PTSD Must Result from Specific Identifiable Act of Duty

Miller v. Bd. of Trustees of the Oak Lawn Police Pension Fund, 2019 IL App (1st) 172967-U

In recent years, we have seen an increase in disability claims for PTSD. These cases can be particularly difficult for pension boards to adjudicate inasmuch as the evidence of disability is sometimes only objective in nature. In this case, a police officer applied for a line of duty disability benefit due to disabling PTSD. The Appellate Court's analysis illustrates the important differences between police and fire related PTSD disability claims.

Plaintiff applied for a line of duty disability due to PTSD. He attributed his PTSD to multiple instances over an extended period of time. The record showed he was exposed to multiple originating factors. For example, Plaintiff was twice deployed to Iraq as a member of the Marine Corp. During his 2004 deployment, he shot and killed a 12 year old enemy solider. Upon return, he participated in counseling through the VA. During a 2007 deployment to Iraq, the armored vehicle he was traveling in struck a hole causing Miller to suffer further injury. In April of 2010, the VA rated Miller as 80% military service connected disability including a 50% disability for PTSD. Following both deployments, Miller was released to full duty as a police officer.

In addition to the incidents in Iraq, Plaintiff attributed his PTSD to multiple instances of trauma as a police officer. For example, Miller testified he witnessed a suicide at a shopping mall in August 2010, was the first officer on the scene and witnessed a female shot in the chest in response to an armed subject call two days later, held a bloody "onesie" as evidence for an instance where an infant had been stabbed in 2013, and witnessed bodies being removed from a murder/suicide fire scene in 2014.

In This Issue

Miller also experienced stressors related to treatment for alcohol consumption and an ongoing divorce. As a result of one of these instances, in 2014 he was charged with two counts of misdemeanor aggravated assault and driving under the influence. The police department placed him on administrative leave.

The Pension Board had Miller examined by three independent medical examiners. All three found him to be disabled. The doctors were split on the issue of the cause of Plaintiff's PTSD. Two of the doctors found the PTSD attributable to multiple events both duty and non-duty related. Dr. Frank specifically found no one specific act which caused the disability but rather, a culmination of events Plaintiff experienced in both the Marines and as a police officer. Dr. Tuder on the other hand, found Plaintiff's disability resulted from the two police incidents occurring in August of 2010. He qualified his opinion on causation adding that if Miller had been untruthful about those events and/or his prior traumatic experiences, his opinion would likely change.

The Pension Board granted Miller a non-duty disability benefit. The Board found Miller's PTSD did not result from a single identifiable act of police duty and also found him to be not creditable in his testimony to both the Pension Board and statements to Dr. Tuder. As a result, the Pension Board discounted Dr. Tuder's opinion because it was based on erroneous facts provided by Plaintiff to the examining physician.

On appeal, the Appellate Court agreed with the Pension Board's finding that Miller lacked creditability. Specifically, it agreed his testimony conflicted with portions of the medical evidence related to the onset of his PTSD diagnosis and found his testimony inconsistent with the police reports and other testimony in the record regarding the August 2010 police response incidents. Because Miller repeated these misrepresentations to Dr. Tuder, the Appellate Court agreed the Pension Board properly discounted his IME findings.

The Court next turned to the issue of causation for Plaintiff's PTSD. Plaintiff argued the Pension Code does not preclude line of duty disability benefits for aggravation of a pre-existing mental condition. In support, Plaintiff cited two cases standing for the proposition a pre-existing physical condition aggravated by an act of duty can result in a line of duty disability award.

The Appellate Court disagreed and found cases involving mental disability for police officers are distinguishable from those claiming physical disability. Specifically, the Court relied on the *Robbins* Illinois Supreme Court case to find that, in duty related stress cases, "courts have required that plaintiff-police officers demonstrate their disabilities are the result of a specific, identifiable act of duty unique to police work."

Applying the *Robbins* standard to this case, the Court found that while Miller's PTSD may be related in part to his police duties, it is not the case it was "triggered or resulted from performance of a specific and identifiable act of police duty inherently involving special risk not ordinarily assumed by a citizen in the ordinary walks of life." Two of the three IME's found Plaintiff's PTSD to be the result of cumulative events as opposed to a singular, specific act of police duty. As a result, the Appellate Court affirmed the Pension Board's denial of line of duty disability benefits.

In short, the Appellate Court held that, for police line of duty cases claiming mental disability, the cause must be attributable to a single identifiable act rising to the level of an act of duty. This differs from the standard for firefighters claiming mental disability. In those instances, courts have distinguished the *Robbins* case as narrowly applying only to the police definition of "act of duty". For example, the court in *Prawdzik v. Bd. of Trustees of the Homer Township Fire Prot. Dist. Pension Fd.* reported in our last newsletter, found, "If a firefighter can show that some 'act of duty' (as defined by section 40 ILCS 5/6-110, which applies to firefighters rather than policemen) causally contributed to his disabling mental condition, he may recover a line of duty pension."❖

No Line of Duty Disability for Firefighter Who Fell in Parking Lot

Frisby v. Village of Bolingbrook Firefighters' Pension Fund, et al., 2018 IL App (2d) 180218

Firefighter Frisby arrived for work 20 minutes before the start of her shift giving her plenty of time to change into her uniform and report for duty. When she exited her vehicle in the station parking lot, she slipped and fell on black ice striking her left shoulder on her car and the ground. She reported to work, performed an ambulance check, installed gear lockers, and drove an ambulance on a fire call. When she reported pain in her left shoulder, she was ordered to go to the emergency room. She applied for a line of duty disability or a not in the line of duty in the alternative.

The Pension Board denied Plaintiff's request for a line of duty but granted a not in the line of duty. On administrative review, the trial court reversed the Pension Board and granted a line of duty finding Plaintiff was required to be at work by a certain time and a reasonable assumption would be she was required to appear before that time so as not to be late. In adopting this reasoning, the trial court relied on analysis performed under the Workers' Compensation Act.

Recall, the concept of an "act of duty" for a firefighter is somewhat broader than that term when applied to a police officer. For a firefighter, an "act of duty" is, "Any act imposed on an active fireman by the ordinances of a city, or by the rules or regulations of its fire department, or any act performed by an active fireman while on duty, having for its direct purpose the saving of the life or property of another." Moreover, "A firefighter shall be considered "on duty" while on any assignment approved by the chief of the fire department, even though away from the municipality he or she serves as a firefighter, if the assignment is related to the fire protection service of the municipality."

On appeal, Plaintiff argued she was entitled to a line of duty disability because she was performing the duty of preparing to begin her shift at the time of her injury. Since the CBA required her to be ready and in uniform at the start of her 7 a.m. shift, she must arrive before that time to prepare and comply with that requirement imposed upon her by the rules of the department.

The Appellate Court reversed the trial court and re-instated the Pension Board decision to deny line of duty benefits. In affirming the Pension Board's decision, the Court disagreed with the complicated factual and legal arguments presented by Plaintiff pertaining to her required arrival at the fire station. Rather, the Court found the factual scenario to be simply that Plaintiff fell arriving at work prior to her scheduled shift. "Plaintiff's argument that she was injured while performing an act of duty relates to the first portion of the definition, as she contends that she fell while performing an act imposed upon her by Village ordinance or fire-department rules or regulations. However, plaintiff's argument essentially would require an interpretation that, because the Village and the fire department require a firefighter to appear at work on time, any act in the process of doing so constitutes an act of duty." The Court agreed with the Pension Board this extends the definition of act of duty too far. In conclusion, the Court found Plaintiff was not yet on duty because her shift had not yet started and no rule or regulation governed her act of exiting her car in the parking lot. The Pension Board's denial of line of duty disability benefits was re-instated.❖

Police Officer Not Entitled to PSEBA for Training Injury

Beckman v. City of Peoria, 2019 IL App (3d) 180467-U

Officer Beckman participated in a mandatory riot training as a Peoria Police officer. During the training, she wore full riot gear and was deployed to a simulation site. She was instructed to treat the simulation as a "real life" emergency. Upon arrival at the simulation site, she slipped and fell on snow and ice covered pavement striking her head on the ground. She was given the option of terminating the simulation and going to the hospital but she

refused treatment based on the instruction she was to treat the simulation as "real life". Plaintiff completed the simulation before seeking medical attention the following day.

The Pension Board granted Plaintiff a line of duty disability. The City held an administrative hearing on her application for PSEBA benefits. In order to be entitled to PSEBA benefits, the officer must show they were "catastrophically injured" in response to what was reasonably believed to be an emergency. Receipt of a line of duty disability pension benefit automatically satisfies the "catastrophically injured" prong of PSEBA. As such, the only issue was whether Plaintiff's injury was incurred by response to what was reasonably believed to be an emergency. While the hearing officer acknowledged Plaintiff was required to react as if an emergency existed during the riot simulation, her application for PSEBA was denied on the basis it did not occur in response to what could reasonably be believed to be an emergency.

The Appellate Court reviewed two seminal Illinois Supreme Court decisions pertaining to training exercises in reaching their determination Plaintiff was not entitled to PSEBA benefits. In the *Gaffney* case, the Supreme Court found the term "emergency" under PSEBA means, "an unforeseen circumstances involving imminent danger to a person or property requiring an urgent response." Applying that definition, the Supreme Court found Gaffney eligible for PSEBA benefits for an injury incurred during a fire training exercise during which his hose became entangled in a smoke filled building. The Supreme Court concluded the training exercise in *Gaffney* turned into an emergency when an unforeseen event occurred causing injury.

In contrast, in the Supreme Court case of *Lemmenes*, the Court found a firefighter not entitled to PSEBA benefits for an injury that occurred during a training exercise requiring him to follow a pre-determined path while wearing a "blacked out" mask to locate a downed firefighter. Unlike the training in *Gaffney*, no live fire was involved. For this training, the firefighter was instructed to terminate the training if his air supply expired. As such, the Court concluded he was not in any real danger.

Ultimately, the Appellate Court found Beckman's training injury more similar to that incurred by the firefighter in *Lemmenes*. It concluded Plaintiff could not have reasonably believed she was responding to an emergency inasmuch as the riot simulation created no imminent danger to her. The fact she was asked whether she could continue after her fall indicated to the Appellate Court this training did not present an emergency situation as that term is used for PSEBA purposes. The Appellate Court affirmed the hearing officer's denial of PSEBA benefits. ❖

Finding Police Officer Had "Recovered" From Disability Upheld

Anderson v. Bd. of Trustees of the Libertyville Police Pension Fund, 2019 IL App (2d) 180459-U

The Plaintiff in this case, a former Libertyville Police Officer, was awarded a line of duty disability following judicial review by the Second District Appellate Court in 2009. His injuries stemmed from incidents occurring in 2004-2005 both involving his left knee.

Pursuant to the requirements of the Pension Code, Plaintiff underwent annual medical exams on his left knee to determine whether he remained disabled. The record showed Plaintiff did not receive any treatment on his left knee for the period between 2013 and 2015 and he was not seen for annual evaluation from 2012 through 2014.

In 2015, Plaintiff returned an affidavit to the Pension Board attesting he had not taken part in any sporting/athletic event (other than a 5k) since going on disability. However, a review of Plaintiff's Facebook activity revealed he was involved in regular exercise programs and competed in various jiu-jitsu tournaments. The Pension Board also hired a private investigator to follow Plaintiff who testified he witnessed him performing in a jiu-jitsu

seminar and routinely stretching his knee without issue.

The Pension Board next sent Plaintiff for an annual examination in 2015. Dr. Primus opined Plaintiff had recovered from his disability. During hearing before the Pension Board on whether Plaintiff could return to work, Plaintiff's treating physician, Dr. Chams, opined he had not recovered from disability and was a good candidate for total knee replacement. Both Drs. agreed Plaintiff suffered from osteoarthritis in his left knee, that it is permanent, degenerative, and will not improve. However, the doctors disagreed as to whether the left knee had improved to the point Plaintiff was no longer disabled.

The Pension Board voted 3-2 to terminate Plaintiff's disability pension. The Board accorded less weight to the opinion of Dr. Chams because he was Plaintiff's treating physician and "more inclined to believe his patient's subjective complaints." The Board also found Plaintiff to be not creditable inasmuch as he omitted any mention of jiu-jitsu tournaments in his 2015 affidavit. As a result, the Board adopted the opinion of Dr. Primus finding Plaintiff had recovered.

Initially, the Circuit Court remanded the matter to the Pension Board to make specific findings on the extent of Plaintiff's jiu-jitsu activities and whether Dr. Primus took into consideration the 2004 and 2005 injuries in determining Plaintiff's current condition. The Pension Board reaffirmed its prior determination Plaintiff was not disabled in a 5-0 vote again adopting Dr. Primus' conclusions. The Circuit Court then reversed the Pension Board's decision as against the manifest weight of the evidence.

The Appellate Court first noted the case is a close call involving complex issues of creditability and medical methodology. The Court attacked the opinion of Dr. Primus relied on by the Pension Board by noting he improperly revisited the reasons for originally finding Plaintiff disabled. In his report, Dr. Primus expressed doubts about whether Plaintiff was ever disabled as noted in the original IME reports from 2007. Reevaluating the grounds for the original disability finding is not permissible in determining whether Plaintiff has recovered from disability.

Despite this misgiving about Dr. Primus' report, the Appellate Court found the Pension Board had sufficient basis to adopt his opinion and reject Dr. Chams' opinion. "Whether Plaintiff has recovered from his disability turns on whether his condition currently renders him unable to perform his duties as a police officer, not on how he came to be disabled or whether his condition will improve. Dr. Primus reconsidered the basis for the original finding of disability, which was plainly improper, but his opinion was based primarily on his assessment that plaintiff lacks pain, weakness, or instability in his left knee." In this manner, the Appellate Court concluded Dr. Primus' report could not be dismissed out of hand.

Finding the annual exam concluding Plaintiff had recovered and could return to work was valid, the Court noted the standard the Board's decision to terminate benefits can be supported by a single medical expert. While acknowledging it is a close case, the Appellate Court affirmed the decision of the Board terminating disability benefits finding, "there is evidence in the record to support the Board's conclusion that plaintiff, with the help of Dr. Chams and physical therapy, has managed his symptoms in a way that allowed him to resume normal activities, including serving as a police officer." ❖

Appellate Court Reverses Denial of Disability Benefits for PTSD

Siwinski v. The Retirement Board of the Firemen's Annuity and Benefit Fund of the City of Chicago, 2019 IL App (1st) 180388

The First District Appellate Court reversed the decision of the Firemen's Annuity and Benefit Fund of Chicago ("Board"), reversed the decision of the circuit court, and remanded the matter to the circuit court with direction to: (1) conduct a hearing to determine attorney fees and costs; and (2) enter

an order remanding the Board to award a line-of-duty disability to Plaintiff-Paramedic.

In the case at bar, Plaintiff experienced traumatic events while on duty as a paramedic. Beginning in October 2010, she carried a stretcher holding the body of a firefighter with whom she had worked, and in October 2012, she was threatened by a hostile crowd at the scene of a shooting. As a result of these events, Plaintiff became hypervigilant, startled at the sound of the firehouse alarm, experienced anxiety while on calls, and withdrew from personal relationships. Despite being able to work as an administrative aide, Plaintiff explained by the time she went on medical leave, her nightmares, anxiety, and depression became unbearable. In 2014, Plaintiff underwent residential treatment and was diagnosed with PTSD, ultimately leading to her disability application.

The Board, in its case-in-chief, called Dr. Frank, a psychologist specializing in mood and anxiety disorders, and its consulting physician, Dr. George Motto. Both physicians examined Plaintiff prior to the hearing. Dr. Frank diagnosed Plaintiff with PTSD and concluded her condition resulted from her employment with CFD. To the contrary, Dr. Motto concluded Plaintiff was not disabled because she had performed her duties "right until" her last day of work and "whatever was going on did not interfere with her being an exceptional paramedic." Dr. Motto conceded he specializes in internal medicine and endocrinology and was not making "a psychiatric opinion." Of further note, Dr. Motto had never diagnosed a patient with PTSD.

The Board issued a unanimous written Decision and Order denying Plaintiff's disability application for line-of-duty benefits. The Board cited several reasons including: (1) Plaintiff did not report her symptoms until several years after the underlying incidents occurred; (2) those incidents were common to paramedic work; (3) her diagnosis relied on "self-reported" symptoms without independent verification; and (4) she lacked credibility.

Plaintiff filed a complaint for administrative review in the Circuit Court of Cook County. The court entered an order vacating the Board's decision and remanding the matter for further proceedings. The court directed the Board to "specifically address" whether Plaintiff was disabled from performing any assigned duty with CFD, including work as a divisional aide. Notwithstanding the circuit court's order, the Board took no additional evidence or argument as directed by the court. Instead, the Board unanimously voted, again, to deny Plaintiff her application for disability benefits, citing similar reasons articulated in its initial Decision and Order.

Plaintiff again sought review of the Board's decision. The circuit court entered an order affirming the Board's decision on remand. The court noted, despite the Board failure to "revisit" whether Plaintiff could perform other assigned duties, the court observed the burden of proof rested with Plaintiff. As such, Plaintiff failed to supplement the record, and the record lacked sufficient evidence to reverse the Board's decision on remand. The Court denied Plaintiff's motion to reconsider, and an appeal ensued.

Here, although the appellate court applied the most deferential standard of review to the Board's decision – manifest weight of the evidence, the court reversed the decision of the Board. The court concluded, "it is apparent that the Board's determination that the plaintiff did not have PTSD was against the manifest weight of the evidence." The court reasoned the Board did not rely on any medical evidence finding Plaintiff did not have PTSD. Rather, the Board noted her diagnosis reflected self-reported symptoms and that she was not credible because she had omitted information regarding her mental history when applying for CFD. The court held, "it is well-established that tangential issues that do not impact the plaintiff's veracity concerning her injury do not, of themselves, destroy the plaintiff's credibility regarding her injury." As such, the Board's credibility determination was against the manifest weight of the evidence and unconnected to the events that occurred years later as a result of PTSD.

Moreover, with respect to causation, the Board ignored Dr. Frank's testimony that: "(1) the plaintiff did not exhibit signs or symptoms of PTSD until she was exposed to work related traumas…(2) the stress and anxiety that she experienced due to events in her personal life were not comparable to the symptoms that she experienced as a result of her job; and (3) because the plaintiff's depression predated her PTSD, and she functioned at work while she had the former condition but not the latter, her disabling condition was PTSD and not depression."

Tellingly, the Court also noted Dr. Motto's testimony added no support to the Board's finding because he never refuted that Plaintiff had PTSD and "he lacked psychiatric expertise or experience examining applicants seeking benefits on mental conditions, and he expressly stated that he was not making a psychiatric opinion."

Accordingly, the court concluded, "only competent evidence of record established a causal connection between the plaintiff's PTSD and at least one act of duty while working for CFD." Furthermore, "Viewing the evidence together, it is apparent that the plaintiff's PTSD disabled her from working for CFD."

Going forward, Pension Board's should be cautious of relying solely on a minority medical opinion where the physician has no expertise in the particular field, especially when dealing with mental disability matters. ❖

Chicago Police Pension Fund Makes Comptroller Intercept Claim

The Policemen's Annuity & Benefit Fund of Chicago has filed a claim with the Comptroller's office to address shortfalls in the City's contribution to the Pension Fund. The Chicago Firefighters' Pension Fund had previously filed an intercept claim with the Comptroller. Intercept requests filed by the Police Pension Fund claim it is owed in excess of $7 million for the years 2016 and 2017 combined. The City has taken the position the alleged shortfalls for both the Police and Fire Pension Funds are the result of a loss in the collection of tax money and not a failure to levy the required amounts. The firefighters' lawsuit over that issue remains pending in Cook County Circuit Court. While the Comptroller has begun withholding grant monies from the City, the City is seeking to recoup those amounts in the ongoing Circuit Court litigation.

Inasmuch as a Comptroller intercept case has yet to yield a substantive appellate court opinion, we will closely monitor this case for any further developments.

Judge Affirms Grant of Firefighter's Widow's Pension. Village Appeals

In an update to a case featured in our July 2018 newsletter, a Lake County judge has affirmed the decision of the Buffalo Grove Firefighters' Pension Fund to grant a line of duty death benefit to the widow of Firefighter Kevin Hauber. Firefighter Hauber died from colon cancer in 2018. He had applied for a line of duty disability benefit in 2014 when first diagnosed. He underwent treatment and returned to duty withdrawing his application. However, in 2017, the cancer returned. Hauber again applied for line of duty disability but died shortly thereafter.

In awarding the line of duty death benefit of 100% of salary attached to rank to Hauber's surviving spouse, the Pension Board relied on two of three independent examining physicians. Those physicians concluded it was possible the effects of cumulative acts of firefighting caused Hauber's colon cancer. Affirming the Pension Board's decision, Lake County Circuit Court Judge Diane Winter noted a number of specific response instances which exposed Hauber to toxic inhalants and other hazards. The Judge found medical studies relied on by the Pension Board were sufficient evidence to support the nexus between Hauber's cancer and his service as a firefighter. Judge Winter rejected the Village's argument no evidence linked Hauber's cancer to firefighting finding that argument, "simply untrue". She further disagreed with the Village's argument the

firefighter's cancer must be linked to a specific act of firefighting finding the statute requires only a showing of the cumulative effects of acts of duty over a career as a firefighter.

Following the Circuit Court's affirmation of the Pension Board's award, the Village promptly appealed. The case is presently pending in the Second District Appellate Court. Inasmuch as there are very few reported decisions on firefighter's cumulative effects of acts of duty and line of duty cancer deaths, we will continue to monitor this case closely. ❖

❖

- ***Suggested Agenda Items for July (or 3rd Quarter)***

- Semi-annual review of closed executive session minutes to determine what needs to remain confidential.
- Election of Board Officers. (e.g. President, Secretary, etc.)
- Potential selection of independent enrolled actuary for recommended tax levy.
- Review status of Trustees' annual training requirements.

REIMER & DOBROVOLNY PC News

- February 4-5, 2019, RD partner, Rick Reimer, presented at the National Association of Police Organizations conference in Las Vegas, Nevada, on municipal bankruptcy.
- March 4-5, 2019, RD partner, Rick Reimer, taught at the IPPFA certified trustee training seminar in Naperville.
- March 27, 2019, RD attorney Mark McQueary presented the legal and legislative update at the IPPFA regional seminar in Rock Island.
- April 11, 2019, RD partner, Brian LaBardi, will present at the Illinois Government Finance Officers Association public pension seminar in Naperville.
- April 29-May 3, 2019, RD attorneys will attend and present at the IPPFA Spring Conference in East Peoria.
- May 3, 2019, RD partner, Brian LaBardi, and attorney, Mark McQueary, will present at the IPFA Spring Conference in Addison.
- RD partner, Rick Reimer, has again been included in the roster of Illinois Super Lawyers, a designation he has held since 2008, recognized by his peers for excellence in employment and labor law.

Legal and Legislative Update

Volume 17, Issue 2, April 2019
This publication constitutes advertising material. Information contained herein should not be considered legal advice.
***Legal and Legislative Update* is published periodically. Questions may be directed to:**
REIMER & DOBROVOLNY PC
A Public Safety Law Firm
15 Spinning Wheel Road, Suite 310, Hinsdale, IL 60521
(630) 654-9547 Fax (630) 654-9676
www.rdlaborlawpc.com