

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

FILED
JAN 28 2015
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

AL JIAS KAHN,)
)
Petitioner,)
)
vs.)
)
THE FIREMEN'S RETIREMENT)
SYSTEM OF ST. LOUIS, et al.,)
)
Respondents.)

Cause No. 1122-CC09264

Division No. 1

ORDER

This matter comes before the court on Petitioner Al Jias Kahn's petition for review of the decision of the Board of Trustees of the Firemen's Retirement System of St. Louis rendered on July 7, 2011, denying Petitioner's application for service-related disability retirement benefits.

Petitioner was born on September 21, 1962, and was appointed to the City of St. Louis Fire Department on October 10, 1988. Petitioner states in his brief that on or about August 4, 2009, while responding to a call to change a 200 pound tire on a fire truck, he passed out. Petitioner states that he was transported to the hospital, where he was treated for hypertension along with concerns over a stroke or TIA. Petitioner, after being released from the hospital, returned to

work as a firefighter until he was informed by Dr. Christine Salter on November 23, 2009, that he was unable to perform the duties of a firefighter due to a diagnosis of cardiomyopathy, obstructive sleep apnea, left ventricle hypertrophy, and hypertension.

Petitioner filed an Application for Disability Retirement with Respondent on November 24, 2009. After an informal review of the matter, Respondent voted to deny Petitioner's application. Petitioner then filed a timely appeal, and a formal hearing was held on May 12, 2011. Respondent's decision denying Petitioner's application was issued on July 7, 2011. Petitioner's petition for judicial review was timely filed on August 11, 2011.

Article V, section 18, of the Missouri Constitution provides for judicial review of administrative actions to determine "whether [such agency actions] are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record." Mo. Const. Art. V, sec.18. Consistent with the constitutional standard, this Court's review of the decision of an administrative agency is limited by Section 536.140.2, RSMo, which restricts the Court's examination as follows:

The inquiry may extend to a determination of whether the action of the agency (1) is in violation of constitutional provisions; (2) is

in excess of the statutory authority or jurisdiction of the agency; (3) is unsupported by competent and substantial evidence upon the whole record; (4) is, for any other reason, unauthorized by law; (5) is made upon unlawful procedure or without a fair trial; (6) is arbitrary, capricious or unreasonable; (7) involves an abuse of discretion.

Upon its proper review of the record, this Court may affirm, reverse, or modify an agency's decision, and the Court may remand for reconsideration in light of its opinion and judgment. Section 536.140.5, RSMo.

Section 4.18.145 of the Revised Code of the City of St. Louis states as follows:

Upon the application of a member in service or of the Chief of the Fire Department, any member who has had five years or more of creditable service shall be retired by the Board of Trustees not less than thirty and not more than ninety days next following the date of filing the application on an ordinary disability retirement allowance, if the Medical Board after a medical examination of the member shall certify that the member is mentally or physically incapacitated for the further performance of duty and that the incapacity is likely to be permanent, and that the member should be retired.

Section 4.18.155 of the Revised Code of the City of St. Louis states as follows:

Accidental disability allowance-Application

Upon application by the member or the Chief of the Fire Department, any member who has become totally and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual

performance of duty or exposure while in the actual performance of duty in response to an emergency call shall be retired by the Board of Trustees, if the Medical Board shall certify that the member is mentally or physically incapacitated for further performance of duty, that the incapacity is likely to be permanent and that the member should be retired. If the accident occurred prior to the beginning of the member's twentieth year of service, application for benefits must be made before this time, except that the interval between the date of accident and the application may be at least one year.

After applying for disability retirement, Petitioner was examined by a three-doctor Medical Board and the Medical Board issued independent medical reports. Dr. Kenneth Selke and Dr. Steven Stahle opined that the Petitioner's incapacitation was permanent and that he was unable to return to his duty as a firefighter and should be retired. Dr. Ibrahim Saeed opined that Petitioner was totally disabled for his job as a firefighter, but stated it was difficult for him "to say if this is a permanent condition without a clear diagnosis." Dr. Selke further stated:

[Petitioner] is a morbidly obese gentleman at 372 pounds with untreated sleep apnea, hypertension, chronic diarrhea, hyperlipidemia, back pain, sedentary life style, and other issues. His main issue now is these spells of loss of consciousness which are not diagnosed. They could be anything from seizures to bradyarrhythmias to narcolepsy.

Dr. Stahle offered diagnoses of "Hypertension poorly controlled; Obstructive sleep apnea not currently being treated; Fatigue

most likely due to sleep apnea; A history of encephalopathy etiology unknown; Etiology of a stroke in the past; and morbid obesity."

At the formal hearing, Petitioner testified that he was forty-eight years old and weighed 360 pounds and had weighed that amount for five or six years. He testified that he had been diagnosed with hypertension at age thirty four, poor circulation at age forty, and sleep apnea. Petitioner testified that there is a history of heart disease in his family and that his mother died of a heart attack in her sixties.

Dr. Stephen Schuman, a doctor retained by Petitioner, stated that Petitioner's incapacitation was the direct result of his work as a fireman on August 4, 2009. Dr. Schuman offered six diagnoses in his report: history of congestive heart failure, hypertension, sleep apnea, severe fatigue due to sleep apnea, prior TIA and probably prior stroke due to his cardiovascular risk factors, and severe migraine-type headaches. Dr. Schuman stated in his report that Petitioner was "totally and permanently disabled" and that the disability was attributed to hypertension related to being a firefighter.

In its Findings of Fact and Conclusions of Law, the Board of Trustees found that the presumption created pursuant to Section 87.006, RSMo, was not applicable, as Petitioner stated that the cause of his disability was stroke in his application

for disability.¹ The Board of Trustees concluded that the Medical Board failed to state that the events of August 4, 2009, were the natural and proximate cause of Petitioner's incapacitation. The Board of Trustees further concluded that Petitioner failed to produce competent and substantial evidence demonstrating that his incapacitation for duty was the natural and proximate result of an accident occurring while in the actual performance of duty.

Petitioner argues that the action of Respondents in denying Petitioner's service-related disability benefits is in violation of constitutional provisions; is in excess of statutory authority or jurisdiction of the agency; is unsupported by competent and substantial evidence upon the whole record; is unauthorized by law; is made upon unlawful procedure or without

¹Section 87.006, RSMo, states:

Notwithstanding the provisions of any law to the contrary, and only for the purpose of computing retirement benefits provided by an established retirement plan, after five years' service, any condition of impairment of health caused by any infectious disease, disease of the lungs or respiratory tract, hypotension, hypertension, or disease of the heart resulting in total or partial disability or death to a uniformed member of a paid fire department, who successfully passed a physical examination within five years prior to the time a claim is made for such disability or death, which examination failed to reveal any evidence of such condition, shall be presumed to have been suffered in the line of duty, unless the contrary be shown by competent evidence.

a fair trial; is arbitrary, capricious, or unreasonable; and involves an abuse of discretion. Specifically, Petitioner argues that an abuse of discretion occurred as a result of failing to provide Dr. Saeed the additional medical records as requested; disregarding the testimony of Dr. Schuman, who was the only doctor to address causation; not considering Petitioner's amendment to his application for disability retirement that listed the cause of his disability as "Stroke/Hypertension"; and disregarding Section 87.006, RSMo, as it applies to hypertension or disease of the heart. Petitioner notes that prior firefighters had been granted disability for strokes and hypertension.

The Court's review is limited to a determination of whether the action is supported by substantial evidence, violates the provisions of any law, or is otherwise arbitrary and/or abuse of discretion. Ruffin v. City of Clinton, 849 S.W.2d 108, 110 (Mo.App. W.D. 1993). Substantial evidence is "evidence which, if true, has probative force upon the issues, i.e., evidence favoring facts which are such that reasonable men may differ as to whether it establishes them; it is evidence from which the trier or triers of the fact reasonably could find the issues in harmony therewith; it is evidence of a character sufficiently substantial to warrant the trier of facts in finding from it the facts, to establish which the evidence was introduced." Orion

Sec., Inc. v. Bd. Of Police Com'rs Of Kansas City, 90 S.W.3d 157, 163 (Mo.App. W.D. 2002).

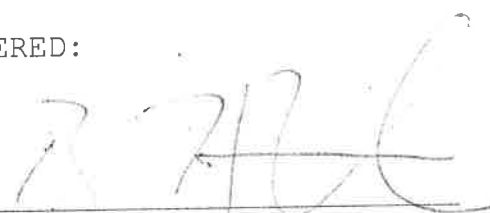
Section 4.18.155 requires that an applicant for disability must be "totally and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty." One of the Medical Board Doctors concluded that Petitioner should be retired. Another opined that he was disabled for his job as a firefighter. The third recited that Petitioner had several diagnoses and a variety of ailments. A fourth doctor - Petitioner's doctor - stated that Petitioner was totally and permanently disabled due to hypertension related to his job as a firefighter.

None of the Board doctors testified to a clear medical finding about the proximate cause of Petitioner's disability or incapacity. The Board of Trustees in its Findings of Fact and Conclusions of Law does not make a finding as to whether or not Petitioner was "totally and permanently incapacitated for duty as the natural and proximate result of an accident occurring while in the actual performance of duty." The case must therefore be remanded to the Board for further review and for proper findings.

ORDER

WHEREFORE, IT IS ORDERED that the decision of the Board of Trustees for the Firemen's Retirement System of St. Louis, denying Petitioner's application for service-related disability retirement benefits, is hereby remanded to the Board of Trustees for further review and findings in accordance with this Order.

SO ORDERED:



Bryan L. Hettenbach, Judge

Dated: JAN 28, 2015

CC: Counsel of record.