

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JOCK RUSSELL,
Appellant,

v.

CITY OF SIERRA VISTA PUBLIC SAFETY PERSONNEL
RETIREMENT SYSTEM LOCAL BOARD,
Appellee.

No. 2 CA-CV 2021-0141
Filed August 26, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Cochise County
No. CV202100140
The Honorable Jason A. Lindstrom, Judge

REVERSED AND REMANDED

COUNSEL

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By Thomas Griffin
Counsel for Appellant

Pierce Coleman PLLC, Scottsdale
By Stephen B. Coleman
Counsel for Appellee

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Vice Chief Judge Staring and Judge Brearcliffe concurred.

E P P I C H, Presiding Judge:

¶1 Jock Russell, a former Sierra Vista police officer, appeals from the superior court's judgment affirming the City of Sierra Vista Public Safety Personnel Retirement System Local Board's ("the Board") denial of his application for an accidental-disability pension. He contends the Board's decision was contrary to law and unsupported by the evidence. For the following reasons, we reverse and remand to the superior court.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the administrative agency's decision. *Hosea v. City of Phx. Fire Pension Bd.*, 224 Ariz. 245, ¶ 10 (App. 2010). Russell worked as a police officer for the City of Sierra Vista ("the city") between February 2002 and March 2010, and again from February 2013 until August 2018. During his first period of employment, Russell experienced a traumatic incident in the line of duty. Upon his termination in 2010 for reasons unrelated to the traumatic incident, Russell ended his membership in the Public Safety Personnel Retirement System (PSPRS). Before he was rehired in 2013, pursuant to A.R.S. § 38-859(B) and as a condition of reemployment, Russell underwent an evaluation with the Board's medical board, which did not identify any pre-existing physical or mental conditions that might limit his future eligibility for an accidental-disability pension. In late 2016 or early 2017, Russell began to experience day dreams in which he relived elements of his traumatic incident dating from his first period of employment.

¶3 Then, in February 2018, while on duty, Russell experienced another traumatic incident. He reported struggling to continue to work and sought medical care within the month, resulting in a workers' compensation claim. A doctor diagnosed him with post-traumatic stress disorder (PTSD), referred him to counseling, and determined he was unable to work. He was approved for leave under the Family Medical Leave Act in May 2018, effective as of April 28, 2018. Although his leave was extended

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through the end of August, the doctor recommended medical retirement. Russell submitted a letter of resignation terminating his employment as of August 3, 2018. He wrote, “[t]hough I am hanging up my gun and badge, I will continue to work in psychology to help prepare officers prepare [sic] for the rigors of this job to ensure they have a healthy, happy, and productive time of service.”

¶4 Later that same month, he applied to the Board for accidental-disability retirement and was referred for an independent medical evaluation (IME). The IME confirmed that Russell’s symptoms qualified for a diagnosis of PTSD and that he could not “work in this field any longer no matter the restrictions or accommodations offered to him.” Addressing the statutory requirements for an accidental disability, the IME found that Russell had a condition that was the basis for the disability application, that the condition had prevented him from performing a reasonable range of duties within his job classification, that it was the result of an event incurred during the performance of his duties, and that there were no discovered “pre-existing conditions or injuries that contributed to the claimed disability.” The IME concluded there were no conflicts in the medical evidence. The IME further noted Russell had suffered from “symptoms that qualify for the diagnosis of post-traumatic stress disorder” since the February 2018 incident. In an email to the IME provider, the Board specifically asked the IME physician to address the “incident that caused the PTSD,” to which the physician responded that “the experience that brought out the PTSD symptoms in a major, far-reaching way was the [February 2018 incident].” The record before the Board also included medical records from Russell’s workers’ compensation claim care providers—a doctor and a psychiatrist—indicating that Russell suffered from PTSD and was unable to serve as a law enforcement officer.

¶5 After an initial hearing spanning several dates, the Board denied Russell’s application for accidental-disability retirement. He requested a rehearing, and the Board affirmed its previous denial. PSPRS then requested another rehearing given its “concerns about the decisions reached by the Local Board” and the apparent conflict with the IME’s findings, asking the Board to base its decision on the IME and to confirm whether Russell’s employment had been terminated “by reason of disability” and whether the condition had been pre-existing. The Board then asked the IME physician to review additional evidence in the record, including the minutes and notes from its initial hearing and an additional IME report requested by the workers’ compensation carrier, and to provide

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an addendum responding to specific questions. In February 2021, the Board again affirmed its denial, and Russell appealed that decision to the superior court.

¶6 On review, the superior court affirmed. It found that the Board’s determinations were supported by substantial evidence, including reports from mental health professionals, colleagues, and personnel records. It specifically found that the record supported the Board’s conclusions that Russell had resigned to pursue another career, not because of his disability, and that “the primary event in Russell’s mental health diagnosis” pre-existed his membership in PSPRS. It noted that the Board had been persuaded that Russell “was attempting to take advantage of the system” given his specialized knowledge of psychology. The court concluded, “If the process intended the IME to be the sole item for consideration by the [Board], that legal conclusion would tend to render the [Board’s] wider investigation completely irrelevant.” Russell appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-913,¹ and 38-847(J).

Discussion

¶7 Russell argues the superior court erred in affirming the Board’s denial of his application. He contends the Board erred as a matter of law when it concluded he had not resigned because of his disability, his disability was pre-existing, and his disability had not been incurred in the line of duty. We will “affirm the decision [of the Board] unless it is arbitrary, capricious, or an abuse of discretion.” *Hosea*, 224 Ariz. 245, ¶ 10 (quoting *Weller v. Ariz. Dep’t of Econ. Sec.*, 176 Ariz. 220, 224 (App. 1993)). We review to determine whether substantial evidence supports an administrative board’s factual findings, a question of law. *Siler v. Ariz. Dep’t of Real Est.*, 193 Ariz. 374, ¶ 14 (App. 1998). We apply our independent judgment to questions of law, but do not substitute our judgment for that of the Board or superior court on factual questions. *Hosea*, 224 Ariz. 245, ¶ 10; see A.R.S. § 12-910(F). We will only set aside a decision if the Board

¹Section 12-913 allows a party to appeal to the “supreme court,” which we have construed to allow an appeal to this court, as this court was created after the statute’s enactment. *Svendsen v. Ariz. Dep’t of Transp., Motor Vehicle Div.*, 234 Ariz. 528, ¶ 13 (App. 2014).

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acted without reasoning or consideration, disregarding facts and circumstances. *Hosea*, 224 Ariz. 245, ¶ 10.

¶8 “A member is eligible for an accidental disability pension if the member’s employment is terminated by reason of accidental disability.” A.R.S. § 38-844(B). An “[a]ccidental disability” is a “physical or mental condition” that a PSPRS local board finds “totally and permanently prevents an employee from performing a reasonable range of duties within the employee’s job classification and that was incurred in the performance of the employee’s duty.” A.R.S. § 38-842(1). A local board’s finding of an accidental disability must be based on medical evidence by its medical board, which is a “designated physician or a physician working in a clinic appointed by the local board,” but the local board resolves conflicts in medical evidence. § 38-859(A)(1)-(2), (B), (C). To make its rulings or determinations, a local board is generally entitled to rely on evidence not only from the medical board but also the employer, the PSPRS board of trustees, independent legal counsel, or the PSPRS actuary. § 38-847(D)(3), (K).

Reason for Resignation

¶9 Russell contends the Board and the superior court misapplied the law by finding he did not resign due to his PTSD, because a member is not required to indicate his reason for resignation in a resignation letter and is allowed to pursue other gainful activity while also being eligible for an accidental-disability pension. The Board counters that it has the discretion to make credibility assessments and that substantial evidence supported its conclusion that Russell resigned solely to pursue other education and work opportunities.

¶10 At PSPRS’s rehearing, the Board relied solely on Russell’s resignation letter in finding that he did not “terminate by reason of disability.” The minutes and the supporting documentation prepared by the Board reflect that the Board secretary interpreted the letter to indicate Russell had resigned “to pursue other interests,” not because of his disability.² However, the record reflects that during the initial hearing, the Board considered additional evidence to find Russell had resigned to pursue other opportunities, including: assertions that he had a side

²At the initial hearing, the Board secretary also noted Russell’s resignation letter said he was resigning “to seek other opportunities.”

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business and was pursuing graduate studies in psychology; statements from a Board member that Russell faced financial difficulties and was undergoing a divorce—which the member raised because she noted “divorce and death are the number one contributors to stress”; and claims from his supervisor casting doubt on Russell’s credibility.³

¶11 On appeal, the Board argues there was substantial evidence supporting its finding that Russell did not resign because of a disability: Russell’s side business, his graduate studies in performance psychology, his resignation letter with no mention of his PTSD, his continued work for several months after the February 2018 incident before taking medical leave, and supervisors’ observations that he did not have issues with his job performance.

¶12 But § 38-844(B) does not require that a PSPRS member’s accidental disability be the sole reason for, or cause of, his resignation. *Parkinson v. Guadalupe Pub. Safety Ret. Loc. Bd.*, 214 Ariz. 274, ¶¶ 15, 17 (App. 2007) (no statutory requirement that member motivated by factual circumstance or non-disability reason be disqualified from receiving disability pension where independent medical report established member was physically unable to perform job duties). If a member is unable to perform his job duties due to his disability, § 38-844(B) is satisfied even if other motivations for retirement exist. *Id.* ¶¶ 14, 17-18.

¶13 The Board asserts that it may resolve a disability application by making factual determinations on non-medical issues, relying on *Hosea*, 224 Ariz. 245. There, we concluded that substantial evidence supported the local board’s decision to deny a member’s application for accidental disability because his sole reason for terminating his employment was having reached a contractually agreed-to retirement date under a Deferred Retirement Option Plan (DROP). *Hosea*, 224 Ariz. 245, ¶¶ 3-7, 14, 29. Although the member had reported an injury, he had not sought workers’ compensation or treatment at his employer’s health center, instead taking sick leave, and had worked on full-duty status as a firefighter until the last day in his DROP period. *Id.* ¶¶ 20-21. The local board denied his application without referring him for an IME. *Id.* ¶ 7. In affirming that

³The Board noted that Russell’s supervisor’s statements at the hearing suggested that, in his opinion, Russell “was setting up a disability retirement,” and because of Russell’s background in psychology, Russell “knew what to say for a PTSD diagnosis.”

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decision, we distinguished the case from *Parkinson* because substantial evidence supported the board's finding that the alleged disability was not a reason underlying his resignation. *Id.* ¶¶ 14, 29-30.

¶14 Here, the Board abused its discretion when it determined Russell did not terminate employment by reason of a disability. First, the Board ignored uncontroverted medical evidence showing that Russell had been unable to work at the time of his resignation due to PTSD. *See* § 38-859(C) (finding of disability must be based on medical evidence, board limited to resolving conflicts in medical evidence). Unlike the member in *Hosea*, Russell reported his injury, sought workers' compensation, and was absent on medical leave for more than three months, through the time of his resignation. A doctor's note written days before he resigned indicated that Russell would have been unable to work through the end of August. The record includes documentation related to his workers' compensation claim in which both a doctor and a psychiatrist affirm his diagnosis and that he was unable to work. The IME's findings supported rather than conflicted with that medical evidence, as did a subsequent IME conducted at the request of the city's workers' compensation carrier. The majority of the Board ignored this uncontroverted evidence in determining that his disability was not a reason for his resignation. Although the Board heard statements during its initial hearing that Russell was pursuing graduate studies and had a side business, none of this evidence contradicted that he had met the statutory requirement that he be unable to work as a police officer due to his disability. *See* § 38-844(B). As we concluded in *Parkinson*, the statute does not require that Russell's "disability [be] the sole cause of the end of his employment." 214 Ariz. 274, ¶ 15.

¶15 Second, the Board based its finding that Russell had resigned in order to pursue another career on his resignation letter. But we agree with the superior court that "[h]is letter did not indicate any particular reasons for his resignation."

¶16 Finally, although the Board suggests the evidence shows Russell performed his duties without issue for several months following the incident, Russell made a workers' compensation claim seeking care within a month of the incident. And his immediate supervisor opined that Russell had performance issues beginning right around or shortly after the incident. Those issues were documented in a memorandum that became part of the record. PTSD may have a delayed expression or subtle onset.

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Cf. Pitts v. Indus. Comm'n, 246 Ariz. 334, ¶ 18 (App. 2019) (considering timeliness of workers' compensation claim for PTSD). That Russell continued to work in the immediate aftermath of the February 2018 incident does not suggest that he was able to work as a police officer at the time of his resignation. Given this, and that the Board unreasonably interpreted his resignation letter to state that he retired solely to pursue other opportunities, substantial evidence did not support the Board's finding that Russell had not resigned by reason of his disability.

Pre-Existing Condition Not Incurred in the Line of Duty

¶17 Next, Russell contends the Board was required to rely on its medical board to evaluate whether his PTSD was a pre-existing condition. The Board argues Russell failed to establish a "sufficient causal nexus between his mental health condition and any job-related stressors that he experienced during his second term of employment" and that substantial evidence supported a finding that his PTSD "was not incurred during his second term of employment." In other words, the Board asserts the requirement that the mental condition be "incurred in the performance of the employee's duty," § 38-842(1), when read together with the requirement that a mental condition not have "existed or occurred before the member's date of membership in the system," § 38-844(D)(3), makes Russell ineligible for a disability pension for PTSD because one of the contributing traumatic experiences predated his current membership, even if it occurred in the line of duty as a police officer with the city. However, this position is not supported by substantial evidence in the record. *See Siler*, 193 Ariz. 374, ¶ 14.

¶18 During PSPRS's rehearing, the Board found that Russell's disability was the result of an event occurring before his current membership in the PSPRS. To do so, it relied on medical evidence, including the IME, which had referenced the traumatic incident that occurred during his first period of employment and its "profound effect on Mr. Russell." The addendum to the IME noted, "This incident may be a contributing factor to the development of his PTSD, even if actual symptoms of that condition did not fully express themselves [until] years later." The addendum additionally stated Russell's symptoms "derive from all the traumatic experiences he encountered during his time on the police force," and the incident from the first employment period was "one of the experiences." A Board member argued that the first incident was a substantial contributing cause occurring before Russell's current

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membership, and the Board unanimously moved to find that Russell's condition had occurred before his current PSPRS membership. Then, the Board determined Russell's condition had not been incurred during the performance of his duties. The Board member again reasoned that if a traumatic incident that was a substantial contributing cause of Russell's PTSD had predated his current membership, his PTSD was not incurred during the performance of his duties.

¶19 Whether or not Russell's PTSD pre-existed his hiring in 2013 is a medical determination, and the Board was entitled to conclude that his condition pre-existed his current employment only if competent medical testimony supported that determination. See § 38-859(A)(2), (B) (medical board "[e]valuate[s] a member's eligibility for an accidental disability pension" and determines disability); § 38-859(C) (disability finding shall be based on medical evidence by medical board); cf. *Pitts*, 246 Ariz. 334, ¶ 21 (given the complex nature of PTSD "expert testimony is generally required to assess when such a diagnosis could have been made"); *Tronsen v. Indus. Comm'n*, 18 Ariz. App. 149, 150 (1972) (fact-finder must rely on expert medical testimony if answer is "within the province of medical knowledge"). However, a local board is empowered to resolve material conflicts in the medical evidence. § 38-859(C). The Board argues the medical evidence was equivocal such that it was "empowered to resolve the conflicts in the record." Equivocation may be found if a physician "avoid[s] committing to a particular opinion," or if the physician's testimony is subject to two or more interpretations. *Rosarita Mexican Foods v. Indus. Comm'n*, 199 Ariz. 532, ¶ 13 (App. 2001) (explaining equivocation in workers' compensation evidence). But equivocal testimony is insufficient to either form the basis for awarding or denying an entitlement, or to create a conflict in the evidence. *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, ¶¶ 10-11, 15 (App. 2012) (equivocal medical testimony did not result in conflict in evidence in workers' compensation claim); *Walters v. Indus. Comm'n*, 134 Ariz. 597, 600 (App. 1982) (fact-finder's resolution of conflicting medical opinions will not be disturbed if it accurately evaluated whether there was conflicting opinion).

¶20 Here, there was no medical evidence suggesting that Russell could have been diagnosed with PTSD before he was rehired in 2013. The designated physician did not equivocate when it told the Board that the earlier traumatic incident "cannot be said to be a 'pre-existing condition' in its own right" because it did not materially impact Russell's daily functioning. At the earliest, the only PTSD symptoms described in the

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medical evidence occurred three years *after* Russell returned to work. When the IME physician noted in his addendum that he had “no significant knowledge of when Mr. Russell first started experiencing symptoms of PTSD,” this did not create a conflict in the medical evidence. He then elaborated that “two years before I interviewed him, which would be approximately early 2017, he started to experience distressing symptoms,” concluding “it is more likely than not that symptoms of PTSD developed after [his rehiring date].” *See Hackworth*, 229 Ariz. 339, ¶ 15 (“[m]edical evidence need show only probabilities, not certainties”).

¶21 Thus, the expert medical evidence before the Board indicated that Russell’s symptoms and subsequent diagnosis both came after his rehiring, and there was no material conflict for the Board to resolve.⁴ Accordingly, the Board abused its discretion by substituting its own understanding of PTSD for that of medical experts, disregarding expert testimony. *See* § 38-859.

¶22 As the Board points out, entitlement to an accidental-disability pension also required Russell to establish a causal relationship between his disability and the performance of his duty as an officer. *See* § 38-842(1); *Wills v. Pima Cnty. Pub. Safety Pers. Ret. Bd.*, 154 Ariz. 435, 436 (App. 1987) (“incurred” means “to occur as a result”) (quoting Webster’s Third New Int’l Dictionary 1146 (1971)); *see also* A.A.C. R2-19-119(B) (party asserting entitlement has burden of proof). “Causal connection means more than just a contributing factor,” *Wills*, 154 Ariz. at 436, and medical causation can only be resolved by expert medical testimony, *cf. Siqueiros v. Indus. Comm’n*, 20 Ariz. App. 104, 109 (1973) (in workers’ compensation “law is clear that the medical causation question can be resolved only by expert medical testimony”).

¶23 The medical evidence in the record was unequivocal as to the issue of causation: the traumatic incident from the first employment period “may be a contributing factor”; other areas of stress in Russell’s life, such as his divorce and financial problems, did not cause the PTSD symptoms even

⁴Although the Board contends it is “not surprising” that Russell’s PTSD was missed during his pre-employment medical examination since a diagnosis would rely on a “full and candid reporting of symptoms,” Russell’s medical examination report from his rehiring is consistent with the IME conducted to evaluate his eligibility for the accidental-disability pension.

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if they exacerbated his anxiety and depression; and “[h]is repeated exposure to traumatic events on the job during his second term of employment . . . created the environment where [Russell’s] reaction to these stressors would eventually intensify and become the full-blown syndrome of PTSD.” Based on this evidence, the first traumatic incident could not have been the cause of the PTSD as it only may have been a contributing factor, *see Wills*, 154 Ariz. at 436 (contributing factor not sufficient to establish causation), and the PTSD was incurred in the second period of employment.

¶24 Had the Board felt that its medical board was in error, it had the option of employing other physicians or clinics to provide evidence. *See* § 38-859(C).⁵ It did not do so, instead substituting its own lay understanding of the medical causation of PTSD for that of an expert, and thereby abused its discretion.

Attorney Fees

¶25 Russell requests his attorney fees pursuant to A.R.S. §§ 12-341 and 12-348. As the prevailing party, Russell is awarded his costs and attorney fees incurred on appeal upon compliance with Rule 21(b), Ariz. R. Civ. App. P. *See* §§ 12-341, 12-348(A)(2) (mandating award of fees to prevailing party “on the merits in . . . [a] court proceeding to review a state agency decision”).

Disposition

¶26 Because the Board’s findings were unsupported by substantial evidence in the record, and because the Board abused its discretion by disregarding uncontroverted evidence regarding medical causation, we reverse and remand to the superior court for further orders consistent with this decision.

⁵The statutory scheme also contemplates that a member may recover from an accidental disability, such that the Board might require an IME in the future. *See* § 38-844(B) (last disability payment to be made first day of month disability ceases); § 38-844(E)(1) (pension terminates if sufficiently recovered).