Czarnecki v. Merit System Board

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Argued March 28, 2007

Before Judges Cuff, Winkelstein and Fuentes.

Petitioner Robert Czarnecki appeals from the final decision of the Merit System Board (Board) finding that the City of Trenton did not violate the Law Against Discrimination, N.J.S.A. 10:5-1 to -42, when it terminated his employment as a fire captain. The Board held that his permanent disability, resulting from a series of work-related accidents, rendered him unable to discharge the essential functions of the position of captain in a fire fighting company. The administrative position assigned to him by the City as a temporary accommodation for his disabilities did not obligate the City to continue to employ him in that capacity.

After reviewing the record before us, and in light of prevailing legal standards, we affirm. These are the controlling facts.

I.

Petitioner began his career as a firefighter for the City of Trenton in August 1983. In 1988, he took a two-month leave of absence to recover from a back injury that was the result of a work-related accident. About six months thereafter, petitioner re-injured his back in the process of extinguishing a car fire. He herniated two discs in his spinal cord, and was unable to return to work for four months.

In 1990, petitioner was promoted to captain. One year thereafter, he suffered another injury to his back when he was knocked backward by flames in a burning building. He underwent surgery for that injury, and remained out of work for nearly a year. After the surgery, he "continued to have some intermittent problems," but within six months of returning to work he resumed his prior position as captain of a company.

In April 1999, petitioner suffered yet another injury when an unsecured oxygen tank fell on the same area of his back that he had injured in 1991. When he awoke the next morning, he had numbness in his right leg, tenderness in his right buttocks, and difficulty walking on his right foot; also, "there was evidence of a right foot drop," a neurological condition that affects petitioner's balance, causes his foot to "flop," and leads to tripping.

After a few days without improvement, petitioner was diagnosed with another herniated disc. As a result, he underwent another surgical procedure, and began a regimen of physical therapy. Although he showed some improvement from the physical therapy, he did not fully recover. He continued to have pain and stiffness in his back and right leg, and his "foot drop" problem remained unresolved. In the summer of 1999, petitioner was prescribed a right ankle brace to secure his foot. Petitioner could walk without tripping while wearing this brace.

In December 1999, Dr. Michael Makowsky examined petitioner on behalf of the City. In his report, Dr. Makowsky noted that he did not expect petitioner's foot drop to improve in any significant way. In his medical opinion, the injury left petitioner "permanently and partially disabled" and unable to "fulfill all the job requirements of a firefighter."

While acknowledging the limitations inherent in his disability, petitioner did not want to retire at that time. Thus, in or around February 2000, petitioner met with the Director of the Department of Public Safety, Dennis Keenan, to discuss whether the Department could accommodate him by giving him a light-duty assignment. Given petitioner's experience with computers and electronics, Keenan agreed to consider assigning petitioner to work with Captain Donald Kanka, the Computer Assisted Dispatch (CAD) system administrator.

Shortly thereafter, Keenan met with Kanka and the Department's Deputy Chiefs, Richard Snyder and Stephen Benner, to discuss assigning petitioner to an administrative position under Kanka. Despite the general policy that light-duty assignments should only last for six months, they agreed to keep petitioner as a CAD manager for as long as Kanka could use him.

Keenan, Kanka and Snyder testified that in creating the position for petitioner, they were accommodating his request to acquire twenty-five years of pension service. They acted under a "gentlemen's agreement," said Snyder, that the Department would keep petitioner until he "reach[ed] his retirement eligibility" in September 2002. Petitioner denied the existence of such an agreement, claiming that he only agreed to retire if he could not return to full duty after six months of light duty.

On March 6, 2000, petitioner began his light-duty assignment as CAD manager. In addition to managing the CAD system, his duties included overseeing the alarm system and investigating fires as a fire marshal. While his position was primarily administrative, his work on the alarm system required some crawling and climbing on ladders; his work as fire marshal required him to wear "full fire gear" and dig through fire debris.

On June 22, 2000, petitioner was reexamined and again found not fit to resume regular fire fighting activities. According to Dr. Makowsky's notes, he and petitioner agreed to continue his light duty assignment until August 1, 2000, at which time "[petitioner] is hoping to have what he is currently doing now [CAD manager] made into a permanent position which is much lighter than the full job requirements of a firefighter."

Petitioner and Dr. Makowsky met again on August 1, 2000. According Dr. Makowsky, petitioner told him that if Dr. Makowsky issued petitioner a full release, the Department would keep him as CAD manager. Thus, Dr. Makowsky discharged petitioner from his care; recommended that he return to work "full-time;" and did not list any limitations regarding petitioner's capabilities. Dr. Makowsky testified that he issued these recommendations with the understanding that petitioner's employment duties would be limited to administrative work. Petitioner denied the existence of such an "agreement" with Dr. Makowsky. He testified that he continued his position as CAD manager only because the Department needed him there.

Sometime thereafter, petitioner was examined by Dr. Richard Rubin and Dr. Nicholas Diamond in connection with a Worker's Compensation claim. Both physicians submitted reports on petitioner's symptoms and level of disability.

In a report dated August 2001, Dr. Rubin indicated that petitioner had "low back pain radiating down the right leg . . . stiff[ness] in cold or damp weather and . . . difficulty ambulating." He had become "fearful of walking on ice, snow, gravel, and uneven terrain because of the weakness of the right leg and especially the foot drop which causes him to topple over and constantly reduces his pace and ability to complete tasks in a timely manner, even shopping." According to Dr. Rubin, petitioner had come to the realization that "there is no way he could go back to his former activities as a firefighter."

Dr. Rubin thus opined that petitioner suffered from permanent partial neurologic impairment of 60% of total, an increase of 15% over my previous very substantial estimate of 45% of total.

As a result of his painful and disabling injuries he has developed a neuropsychiatric impairment best placed in the category of an Adjustment Disorder with depression and fears of exertion (309.28) which I rate as an additional 35% of total, and [sic] increase of 15% over my previous substantial estimate.

In my opinion this man is barely in the work-force and he is fortunately [sic] to have been provided with an occupation within his residual functional capacity.

Dr. Diamond reached a similar conclusion. He noted that petitioner "complain[ed] of low back pain, . . . right buttock pain . . . [and] pain below his right knee . . . down into his right foot with foot drop weakness." Petitioner had "difficulty performing household duties[;] . . . performing personal care of washing and dressing[;] . . . climbing stairs and sleeping[;] . . . performing movements of bending, lifting greater than 50 pounds, twisting, and squatting[; and] . . . driving of a motor vehicle." According to Dr. Diamond, "Posturally, [petitioner] can sit comfortably for 20 minutes, can stand comfortably for 15 minutes, [and] can walk comfortably for 15 minutes."

In the spring of 2002, petitioner settled his Worker's Compensation case, prompting the City's insurance carrier to request a functional capacity evaluation to determine the extent of his disability.

Physical Therapist Bernadette Carr performed the evaluation. Carr reported that petitioner's strength deficiencies diminished his ability to lift, carry and pull, while his balancing deficiency inhibited him from being able to safely climb ladders. In her opinion, petitioner was physically unfit to be a fire captain. Dr. Makowsky joined in Carr's assessment, and so notified the City.

In May 2002, City Business Administrator Jane Feigenbaum discussed with petitioner the results of his physical examinations. Feigenbaum notified him that as of October 1, 2002, his CAD manager position would no longer be available because the City had decided to privatize its computer services system. According to petitioner, Feigenbaum told him that as a result, he had the option to retire. He indicated that he was not ready to retire, and asked if he could be retested with his ankle brace. (Petitioner wore his brace for part, but not all, of the functional capacity evaluation). Feigenbaum refused, offering him instead a civilian position, or assistance in finding him employment with the company that was taking over the City's computer system. Petitioner refused both options because they would negatively affect his pension.

Petitioner filed an application for retirement with an effective date of September 1, 2002. Due to a delay in completing the necessary paperwork, he changed the date to October 1, 2002, and then to February 1, 2003. When he reported to work on October 1, 2002, petitioner received a Preliminary Notice of Disciplinary Action for being unable to perform his job duties as a firefighter, in violation of N.J.A.C. 4A:2-2.3(a). That morning the City held a hearing and decided to suspend petitioner effective October 2, 2002.

In November 2002, Dr. James Taitsman examined petitioner in connection with his application for accidental disability benefits. Consistent with Dr. Rubin's and Dr. Diamond's opinions, Dr. Taitsman concluded that petitioner was "permanently and totally disabled from performing duties as a fire captain or firefighter" and that he could only work in an administrative capacity.

In response, petitioner began training to improve his strength. In November 2003, petitioner contacted Dr. James Schorsch and asked him to administer a functional capacity evaluation. After the evaluation, Dr. Schorsch reported that "[d]o [sic] to limited endurance and maximal lift capacity, the client is not ready to return to general fireman duty." Dr. Schorsch re-administered the evaluation in February 2004. This time, he reported that petitioner was physically fit to be a fire captain.

II.

In a Final Notice of Disciplinary Action dated October 23, 2002, Public Safety Director Keenan summarily found that, based on the medical evidence discussed herein, petitioner was unfit to return to his previous assignment as captain of a fire fighting company. Based on the City's privatization of petitioner's administrative position as CAD manager, the Department could not continue his temporary light-duty assignment either.

By letter dated November 4, 2002, petitioner appealed that decision. The case was referred to the Office of Administrative Law for adjudication before an Administrative Law Judge (ALJ). In an August 17, 2005, decision, the ALJ concluded that, based on a number of medical evaluations, the City had "overwhelmingly established" that petitioner was unfit to fight fires. The ALJ also discounted petitioner's recent performance on a functional capacity evaluation and an entrance exam, concluding that they did not refute the evidence documenting his physical limitations. Finally, because the City had privatized his position, the Department could no longer accommodate him and thus properly dismissed him. The Board adopted the ALJ's findings of fact and conclusions of law and affirmed the propriety of the dismissal.

III.

On appeal from a final agency determination, we review the final decision of the agency head, not the ALJ's initial decision. See De Vitis v. N.J. Racing Comm'n, 202 N.J. Super. 484, 490, (App. Div.), certif. denied, 102 N.J. 337 (1985). We give substantial deference to the agency head's determination and reverse "only if it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." Stevens v. Bd. of Trs., Pub. Employees Ret. Sys., 294 N.J. Super. 643, 651 (App. Div. 1996) (emphasis omitted) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). Given this standard of review, we discern no legal basis to disturb the Board's findings and conclusions.

In Raspa v. Office of the Sheriff of Gloucester, ____ N.J. _____ (2007) (slip op. at 1), the Supreme Court considered the question of whether, as a matter of law, an employee can prosecute a claim alleging that his employer failed to accommodate the employee's disability in violation of the Law Against Discrimination (LAD), . . . when the employee's permanent disability renders him unable to discharge essential functions of the position in which he was employed.

In Raspa, a Sheriff's Officer assigned to the County Jail developed a disease that prevented him from having contact with prison inmates. Ibid. As a temporary accommodation, the Sheriff's Department placed him in a variety of light-duty assignments for over a three-year period. Id. (slip op. at 2). The Department decided that this arrangement could not continue indefinitely, and processed his involuntary disability retirement. Ibid.

Against these facts, the Supreme Court held:

[A]n employee must possess the bona fide occupational qualifications for the job position that employee seeks to occupy in order to trigger an employer's obligation to reasonably accommodate the employee to the extent required by the LAD. In that context, we further hold that an employer may reasonably limit light duty assignments to those employees whose disabilities are temporary, and that the availability of light duty assignments for temporarily disabled employees does not give rise to any additional duty on the part of the employer to assign a permanently disabled employee

indefinitely to an otherwise restricted light duty assignment. [Ibid.]

The facts and issues in Raspa are thematically similar to petitioner's case. Here, the medical evidence unquestionably established that petitioner is physically unable to perform the essential functions of a firefighter. These limitations are permanent in nature, and render him unfit and unqualified for the position he seeks. As in Raspa, the City is not legally obligated to create or maintain a light-duty assignment position, initially offered as a temporary accommodation for what was then perceived to be a temporary job-related disability.

Affirmed.