

MUNICIPAL FIRE AND POLICE RETIREMENT
SYSTEM OF IOWA
2836 104th Street
Des Moines, Iowa 50322

IN THE MATTER OF:

JAMES R. NABER,

Applicant.

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DECISION

Iowa Code § 411.6(3) (2001) and
Iowa Code § 411.6(5) (2001)

STATEMENT OF THE CASE

The applicant, James R. Naber ("Naber"), filed an application for accidental disability benefits with the System on or about May 30, 2002. On August 6, 2002, the Medical Board at the University of Iowa Hospitals and Clinics reported its findings to the System regarding Naber's disability. An initial decision awarding Naber an ordinary (rather than accidental) disability pension was made by the System on August 27, 2002.

Upon timely appeal by Naber, a hearing was held before the Appeals Committee of the Board (comprised of Marty Pottebaum, Jody Smith, and Mary Bilden, Chair) on November 21, 2002 at the offices of the System. Naber appeared and was not represented counsel. The City of Muscatine did not appear. Dennis Jacobs, Executive Director, appeared on behalf of the System. Alice Helle of Des Moines, Iowa was present as counsel to the Committee. Naber represented himself and testified before the Committee. There was no other testimony. He waived briefs.

FINDINGS OF FACT

The Committee, having reviewed the evidence of record, finds as follows:

1. Naber commenced employment with the City of Muscatine, Iowa as a police officer on or about June 23, 1975.
2. The Medical Board found that Naber is physically incapacitated from performing as a police officer as a result of a progressive sensorineural hearing loss, and that the incapacity is likely to be permanent.
3. Naber testified that he was a firearms instructor for more than 20 years, and from about 1977 to 1987, he was the only firearms instructor for the Muscatine Police

Department. Beginning in 1987, he split those duties with three other officers. No hearing protection was used on the range until sometime in the early 80's.

4. Naber also testified that he received a blow to the left side of the head in a defensive tactics training exercise on January 15, 2000. He filed an injury report. He stated that he felt a sharp pain in his head and "deadened feeling and a hissing sound." He testified that he experienced tinnitus immediately, and that it has been an ongoing problem since. He also testified that, until this injury, his left ear was his "good ear" and he relied on it to get by. He stated in his letter of appeal that the injury destroyed the hearing in his left ear.
5. Jay Rubenstein, M.D. of the University of Iowa Hospitals and Clinics, Naber's treating otolaryngologist, stated in a letter dated May 19, 2002 to Captain Mike Scott of the Muscatine Police Department that Naber has a "substantial noise-induced hearing loss bilaterally."
6. John Lee, M.D., who is also an otolaryngologist with the University of Iowa Hospitals and Clinics, performed a disability evaluation of Naber as part of the medical board. Dr. Lee stated in his August 4, 2002 letter to Dr. Hartley that Naber has a history of "progressive sensorineural hearing loss" and that his risk factors include being a firearms instructor with no hearing protection, with a significant amount of noise-induced trauma to the ears. Dr. Lee further stated that Naber's audiogram "is suggestive of noise-induced sensorineural hearing loss with a peak frequency loss around 4000 Hz."
7. Dr. Rubenstein stated in a letter dated October 14, 2002 that Naber has "a long-standing noise-induced hearing loss due to many years of firearm exposure." He noted that documentation provided by Naber of his position during firearm instruction tends to support Naber's assertion "that chronic firearm exposure has caused worse hearing loss in the right ear than in the left." He further stated that, "while there is no audiometric documentation of his hearing prior to his injury on January 15, 2000, at the Muscatine Public Safety Building, if his documentation is correct, it is more likely than not that this specific injury aggravated the hearing loss in the left ear to the point where he is no longer able to perform all the duties of a police officer."

CONCLUSIONS OF LAW

1. Iowa Code § 411.6(3) states:

3. Ordinary disability retirement benefit. Upon application to the system, of a member in service or of the chief of the police or fire departments, respectively, any member shall be retired by the system, 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 certifies 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. However, if a person's membership in the system first commenced on or after July 1, 1992, the member shall not be eligible for benefits with respect to a disability which would not exist, but for a medical condition that was known to exist on the date that membership commenced. A member who is denied a benefit under this subsection, by reason of a finding by the medical board that the member is not mentally or physically incapacitated for the further performance of duty, shall be entitled to be restored to active service in the same position held immediately prior to the application for disability benefits.

2. Iowa Code section 411.6(5) states (in relevant part) as follows:

5. Accidental disability benefit.

a. Upon application to the system, of a member in service or of the chief of the police or fire departments, respectively, any member who has become totally and permanently incapacitated for duty as the natural and proximate result of an injury or disease incurred in or aggravated by the actual performance of duty at some definite time and place, or while acting pursuant to order, outside of the city by which the member is regularly employed, shall be retired by the system, if the medical board certifies 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. However, if a person's membership in the system first commenced on or after July 1, 1992, the member shall not be eligible for benefits with respect to a disability which would not exist, but for a medical condition that was known to exist on the date that membership commenced. A member who is denied a benefit under this subsection, by reason of a finding by the medical board that the member is not mentally or physically incapacitated for the further performance of duty, shall be entitled to be restored to active service in the same position held immediately prior to the application for disability benefits.

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c. Disease under this section shall mean heart disease or any disease of the lungs or respiratory tract and shall be presumed to have been contracted while on active duty as a result of strain or the inhalation of noxious fumes, poison or gases. However, if a person's membership in the system first commenced on or after July 1, 1992, and the heart disease or disease of the lungs or respiratory tract would not exist, but for a medical condition that was known to exist on the date that membership commenced, the presumption established in this paragraph shall not apply.

3. It is undisputed that Naber is incapacitated from performing as a police officer due to his hearing loss. The issue is whether he is entitled to an "ordinary" or "accidental" disability pension.

4. Naber argues that, while his hearing loss in the right ear was caused by repeated exposure to excessive noise from gunfire on the job, he was able to rely on his left ear, which was less damaged, until the training injury he suffered on January 15, 2000. He argues that, at that definite place and time, his hearing loss in his left ear was aggravated to the point that he was no longer able to perform all the duties of a police officer.
5. Naber is required to prove that his disability was caused or aggravated by the actual performance of duty at a definite time and place in order to establish entitlement to an accidental disability pension. Dr. Rubenstein's letter dated October 14, 2002 constitutes substantial evidence in support of that requirement.

DECISION

The appeal for accidental disability retirement benefits on behalf of James R. Naber under chapter 411 is hereby approved.

Dated this 21 day of November, 2002.

Mary Belden, Chair
Disability Appeals Committee

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at such attorney's address as disclosed by the pleadings of record herein on the 22 day of November, 2002.

By: ☒ U.S. Mail ☐ Facsimile
☐ Hand Delivered ☐ Overnight Courier
☐ Federal Express ☐ Other

Signature SW