

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D55329
G/htr

_____AD3d_____

Argued - January 25, 2018

ALAN D. SCHEINKMAN, P.J.
JOHN M. LEVENTHAL
BETSY BARROS
VALERIE BRATHWAITE NELSON, JJ.

2016-06978

DECISION & JUDGMENT

In the Matter of John Sestito, petitioner, v City of
White Plains, et al., respondents.

(Index No. 2937/15)

Bartlett, McDonough & Monaghan, LLP, White Plains, NY (Warren J. Roth of
counsel), for petitioner.

John G. Callaghan, Corporation Counsel, White Plains, NY (Doreen Lusita Rich of
counsel), for respondents.

Proceeding pursuant to CPLR article 78 to review a determination of the
Commissioner of Public Safety of the City of White Plains dated May 4, 2015. The determination
adopted the recommendations of a hearing officer dated April 22, 2015, made after a hearing, and
terminated the petitioner's benefits under General Municipal Law § 207-a.

ADJUDGED that the determination is confirmed, the petition is denied, and the
proceeding is dismissed on the merits, with costs.

The petitioner, a firefighter, allegedly was injured while performing his duties on May
22, 2011. He subsequently applied for benefits pursuant to General Municipal Law § 207-a. In
2014, after an examination, the respondents' medical examiner found that the petitioner was capable
of returning to light duty and that there would be a "medium to moderate" chance that he would be
able to resume full duty if he underwent spinal fusion surgery. Thereafter, the respondents' fire chief
sent the petitioner a letter ordering him to return to work on October 1, 2014, to assume a light duty
position, or risk losing his benefits. A second letter sent by the fire chief awarded the petitioner
General Municipal Law § 207-a benefits for the period from May 22, 2011, to October 1, 2014. It
also directed the petitioner to schedule the fusion surgery. The petitioner did not return to work on

May 16, 2018

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October 1, 2014, and did not undergo surgery, choosing instead to proceed with a challenge of the return to work order.

After a hearing, the hearing officer concluded that the fire chief's orders were "reasonable and rational," and that the petitioner's failure to comply with those orders was without justification. The respondents adopted the recommendations of the hearing officer. The petitioner commenced this CPLR article 78 proceeding to review the determination.

The petitioner argues that the respondents' determination is not supported by substantial evidence. We disagree. "Substantial evidence means more than a mere scintilla of evidence and the test of whether substantial evidence exists in a record is one of rationality, taking into account all the evidence on both sides" (*Matter of Solano v City of Mount Vernon*, 108 AD3d 676, 677 [internal quotation marks omitted]). Here, there was substantial evidence to support the determination that the petitioner was fit to return to light duty and that surgery was a reasonable and appropriate treatment. Since the petitioner failed to return to work for his light duty assignment, and did not undergo surgery, his benefits were properly terminated (*see Matter of Pirrone v Town of Wallkill*, 6 AD3d 447; *Matter of Schenectady Police Benevolent Assn. v New York State Pub. Empl. Relations Bd.*, 196 AD2d 171, 174, *affd* 85 NY2d 480).

The parties' remaining contentions are without merit.

SCHEINKMAN, P.J., LEVENTHAL, BARROS and BRATHWAITE NELSON, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court