

**Matter of Wendling v Kelly**

2005 NY Slip Op 30430(U)

November 14, 2005

Supreme Court, New York County

Docket Number: 100187/2004

Judge: Paul G. Feinman

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL GEORGE FEINMAN  
Justice

PART 52

John Wendling  
- v -

Raymond Kelly, etc.

INDEX NO. 100187/04  
MOTION DATE 8/17/05  
MOTION SEQ. NO. 002  
MOTION CAL. NO. 27

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/Petition/ Order to Show Cause — Affidavits — Exhibits  
Notice of Cross Motion—Affidavits— Exhibits  
Answering Affidavits — Exhibits  
Replying Affidavits

**FILED**  
NOV 25 2005  
COUNTY CLERK'S OFFICE  
NEW YORK

PAPERS NUMBERED  
1, 1A  
2, 3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided  
in accordance with the annexed  
memorandum decision, order  
& judgment.

**UNSERVED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Room  
(141B).

Dated: 11/14/05

Paul George Feinman  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X  
In the Matter of the Application of  
JOHN WENDLING,

Petitioner,

For a Judgment under Article 78 of the  
Civil Practice Law and Rules,

Index Number 100187/2004  
Oral Argument August 17, 2005  
Mot. Seq. No. 002  
Mot. Cal. No. 27

against

RAYMOND KELLY, as the Police Commissioner  
of the City of New York, and as Chairman of the  
Board of Trustees of the Police Pension Fund,  
Article II, THE BOARD OF TRUSTEES of the  
Police Pension Fun, Article II, NEW YORK CITY  
POLICE DEPARTMENT and THE CITY OF  
NEW YORK,

Respondents.

**DECISION, ORDER AND  
JUDGMENT**

-----X

**For the Petitioner:**  
Jeffrey L. Goldberg, P.C.  
2001 Marcus Ave.  
Lake Success NY 11042  
(516) 775-9400

**For the Respondent:**  
Michael A. Cardozo  
Corporation Counsel for City of New York  
By: Magda Deconinck, A.C.C.  
100 Church St.  
New York NY 10007  
(212) 788-0752

Papers considered in review of this petition to annul decision:

| Papers   | Numbered     |
|--|--------------|
| Notice of Petition, Affidavits, and Memo of Law .... | <u>1, 1a</u> |
| Answering Affidavits and Memo of Law .....           | <u>2, 3</u>  |

**PAUL G. FEINMAN, J.:**

Petitioner seeks to annul respondent's decision to deny him an accident disability retirement allowance. For the reasons stated below, the petition is granted to the extent that the matter is remanded for a further test and proceedings consistent with this decision.

Petitioner was a full time member of the New York City Police Department beginning in 1992 until his early retirement in January 2003. He was diagnosed with hypertension in 1997, when

he was 27 years old. He began taking anti-hypertensive medication in 1998, and started experiencing shortness of breath and tiredness, as well as occasional chest pressure, in about 1999. He went on restricted duty in January 2002. On February 21, 2002, he submitted an application for Accident Disability Retirement (ADR) based on the provisions of General Municipal Law § 207-k, commonly referred to as the Ilcart Bill. At the same time, the Police Commissioner submitted an application on his behalf for Ordinary Disability Retirement (ODR). On April 19, 2002, the Medical Board Police Pension Fund Article II unanimously recommended denial of both his and the Commissioner's application (Ver. Pet. Ex. B).<sup>1</sup> After reconsideration on October 18, 2002, the Medical Board unanimously recommended approval of the Commissioner's application for ODR, but disapproved petitioner's application for ADR (Ver. Pet. Ex. H). A second reconsideration by the Medical Board on June 20, 2003, unanimously affirmed its previous recommendation that petitioner be given ODR but not ADR (Ver. Pet. Ex. K). On September 24, 2003, the Board of Trustees of the Police Pension Fund, acting upon the recommendation of the Medical Board, formally notified petitioner that his application for ADR benefits had been denied and that he would be given ODR benefits (Ver. Pet. Ex. L).

Petitioner commenced this petition pursuant to CPLR 7803(3), arguing that respondents failed to apply the proper legal test for analyzing his application for an ADR pension, made their decision contrary to the competent evidence establishing that he had sustained an ADR disability, and made its decision in a manner that was arbitrary and capricious.

It is a well-settled rule that judicial review of administrative determination is limited to the

---

<sup>1</sup>Although both sets of motion papers contained many of the same exhibits, for ease this decision will site to only one set of papers rather than both.

grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The reviewing court must defer to the administrative fact finder's assessment of the evidence and the credibility of the witnesses (*Lindemann v American Horse Shows Assn.*, 222 AD2d 248, 250 [1<sup>st</sup> Dept. 1995]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1<sup>st</sup> Dept. 1983]). The test of whether a decision is arbitrary or capricious is "determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact." (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). An arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Matter of Pell*, at 232).

Reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept.], *lv denied* 62 NY2d 603 [1984]). The scope of review does not include "any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority" and "the sanction must be upheld unless it shocks the judicial conscience" (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell*, 34 NY2d at 232-234). Once the court has found a rational basis exists for the determination, its review is ended (*Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]). Put another way, the courts may not interfere unless there is no rational basis for the exercise of discretion or the action complained of is found to be "arbitrary and capricious." (*Matter of Pell*, 34 NY2d at 231).

Accident disability retirement benefits are provided to members of the New York City police department who are members of the Police Pension Funds and who become physically or mentally incapacitated from service as the proximate result of an accidental injury received in the course of work, as certified by the departmental medical board (NYC Admin. Code § 13-252). Ordinary disability retirement benefits are provided members of the New York City police department who are members of the Police Pension Funds and who become physically or mentally incapacitated from service and ought to be retired, as established by medical examination and reported by the departmental medical board (NYC Admin. Code § 13-251). The “Heart Bill,” on which petitioner relies, provides that where a police or fire officer is partially or totally disabled by “diseases of the heart,” and at the time he or she commenced service there was no evidence of any condition based upon physical examination, it shall be “presumptive evidence” that the heart disease “was incurred in the performance and discharge of duty, *unless the contrary be proved by competent evidence.*” (Gen. Mun. L. § 207-k[a], emphasis added).

Petitioner argues that respondents’ denial of ADR benefits was arbitrary, capricious, unlawful and an abuse of discretion. He argues that the Medical Board completely disregarded the evidence before it, that respondents chose to rely on the Board’s conclusory opinions which were unsupported by the medical evidence, that there was a failure to address the presumption under the law as concerns heart disease, and that for these reasons, the determination must be voided. He points to *Petition of Lunt v Ward*, 159 AD2d 404 (1<sup>st</sup> Dept. 1990), where the Appellate Division held that the Medical Board had not proffered competent medical evidence to rebut the Heart Bill’s presumption when it concluded, without conducting any stress tests, that the petitioner’s irregular heart beat which commenced about ten years after he was appointed to the police force, was of an

unknown origin. The matter was remanded for the proper tests to be conducted. Because the Medical Board then concluded, based on tests and physical examinations of the officer, that there was no evidence to connect his atrial fibrillation to his hypertension, despite the existence of a report of the officer's doctor which stated that an echocardiogram showed eccentric hypertrophy of the left ventricle, and despite the Medical Board's chief surgeon's statement that the connection between the atrial fibrillation and hypertension had not been disproved, the court annulled the Board's decision to deny the petitioner ADR benefits (*Matter of Lunt v Kelly*, 227 AD2d 200 [1<sup>st</sup> Dept. 1996], *lv denied* 90 NY2d 803 [1997]).

Petitioner also points to *Matter of Liston v City of New York*, 161 AD2d 491 (1<sup>st</sup> Dept.), *lv denied* 76 NY2d 709 (1990), which affirmed the trial court's determination that the petitioner-fire fighter was entitled to ADR as a matter of law, despite the conclusion of the Medical Board otherwise, where there was ample evidence to find that his heart condition was the result of work-related stress, including that his symptoms of lightness of the head and premature weakness manifested 19 years after he became a fire fighter, and because several doctors including cardiologists diagnosed him as having a mitral valve prolapse and arrhythmia. Petitioner argues that his situation is similar to both *Lunt* and *Liston* in that the court should find that the Medical Board failed to rebut the Heart Bill's presumption with competent evidence, and that the denial of ADR benefits should be annulled. *See also, McCarthy v Board of Trustees of the N.Y.C. Police Pension Fund, Art. II*, 306 AD2d 156 (1<sup>st</sup> Dept. 2003) (respondents failed to rebut the undisputed evidence of stress-related heart disease, including hypertension, left ventricular hypertrophy and dyspnea, raising the presumption that disability was job-related).

Respondents argue in response that the Heart Bill is not a guarantee of benefits simply

because an officer develops a disabling heart condition, but awards accident disability retirement benefits where the heart condition develops as a result of stress or other occupational strains on the heart (Rcsp. Memo of Law p. 15). They note that the Heart Bill's presumption is rebutted where the Medical Board has found that the condition is not job-related or caused by stress, including when the cause is unknown and there are no findings of stress-related pathology such as "significant hypertension, coronary artery disease or ischemic damage" shown by diagnostic tests such as thallium scan stress tests, echocardiograms, and cardiac catheterization or angiography (Resp. Memo of Law at 15-17, citing *Matter of Callaghan v Bratton*, 253 AD2d 390 [1<sup>st</sup> Dept. 1998] [atrial fibrillation, with no evidence of heart disease, not caused by work]; *Matter of Stegmuller v Brown*, 216 AD2d 23 [1<sup>st</sup> Dept. 1995], *lv denied* 87 NY2d 807 [1996] [all tests proved negative for heart damage, therefore Heart Bill presumption not rebutted]; *Matter of Goldman v McGuire*, 101 AD2d 768 [1<sup>st</sup> Dept. 1984], *aff'd* 64 NY2d 1041 [1985] [concentric hypertrophy in left ventricle without hypertension held to be competent evidence that disability was not incurred on the job]).

Respondents argue that in the instant matter, the Medical Board relied on ample competent evidence when it concluded that petitioner is disabled not by heart disease, but by dyspnea (shortness of breath) that did not result from his duties as a police officer but rather was of unknown origin. As noted above, the first report issued by the Medical Board, dated April 19, 2002, recommended the denial of any retirement benefits (*see*, Ver. Pet. Ex. B). That report noted and summarized the several reports before it, including a June 2000 report on blood test results; a June 13, 2000 report concerning a cardiac catheterization and a letter from the cardiologist, Dr. Ronnie Hershman, describing and summarizing the results; a February 13, 2002 echocardiogram and nuclear stress test results; a February 20, 2002 note from petitioner's personal physician, Dr. Vicky

Nicholas; a March 12, 2002 cardiac catheterization report and cardiologist's description and summary of the test results; and a March 22, 2002 examination report by Medical Board consultant Dr. Berkowitz. In addition, the Medical Board described the results of its physical examination of and interview with petitioner.<sup>2</sup> The October 18, 2002 report by the Medical Board, modifying its earlier stance to now recommend that petitioner be given ordinary disability benefits (*see* Ver. Pet. Ex. H), indicates that the examiners reviewed the minutes of the April 19, 2002 hearing as well as the previous documents and reports, and also evaluated a June 17, 2002 report issued by petitioner's cardiologist, Dr. Hershman, and a September 26, 2002 nuclear stress test conducted by Dr. Marian David.<sup>3</sup> The examiners again interviewed petitioner and conducted a physical examination. The examiners concluded unanimously that the new evidence and petitioner's current complaints and physical condition, along with the previous evidence, established that he is "disabled with reference to his difficulty with breathing" (Ver. Pet. Ex. H, Med. Bd. Exam ¶ 7). The Medical Board diagnosed him as having dyspnea of uncertain etiology, and stated specifically that there was no evidence of coronary or hypertensive heart disease (*Id.*). Lastly, the June 20, 2003 report by the Medical Board (Ver. Pet. Ex. K), noted that the Board examined new evidence consisting of a January 3, 2003 letter from Dr. Hershman,<sup>4</sup> and again interviewed and examined petitioner. As noted previously, it adhered unanimously to its previous recommendation of granting ODR benefits and denying ADR benefits, concluding that the diagnosis is "Dyspnea of Undetermined Cause;

---

<sup>2</sup>Copies of the documents are included in the Verified Answer as Exhibits 2-8, and 9-11.

<sup>3</sup>Copies of these two documents are included in the Verified Answer as Exhibits 16 and 17.

<sup>4</sup>Copies of this document is included in the Verified Petition as Exhibit I, and the Verified Answer as Exhibit 21.

Hypertension - Controlled” (Ver. Pet. Ex. K, Med. Bd. Report Oct. 22, 2002, ¶ 8).

Respondents argue that the Medical Board’s decision was not arbitrary or capricious, or made in error of law, and point specifically to the Board’s reliance on the June 2002 cardiac catheterization, which concluded that there was “minimal cardiomyopathy” and “normal coronary arterics” (Ver. Ans. Ex. 3), and the February 2002 echocardiogram which concluded that there was “good bi-ventricular function” and “echo study is within normal limits” (Ver. Ans. Ex. 6). They argue that these studies failed to reveal any evidence of ischemia or infarction, and therefore did not show any evidence of coronary artery disease and hypertensive heart disease. However, the Board overlooks the two nuclear stress tests. The first test conducted by Dr. David, on February 13, 2002, included the doctor’s impression that there was “evidence of probable ischemia in the anterior, lateral and inferior segments of the left ventricle” (Ver. Ans. Ex. 5). In fact, the Medical Board examiners looked at the images from that test and “agree[d] with the description of the areas of possible myocardial ischemia.” (Ver. Pet. Ex. B, ¶ 4).<sup>5</sup> The second test report, on September 26, 2002, included the impression by Dr. David that there was “evidence of probable ischemia,” and a “previous inferior, non-transmural infarction with mild peri-infarction ischemia” (Ver. Pet. Ex. F).<sup>6</sup> *The Medical Board’s report was silent as concerns this particular impression.*

The Board also reviewed *without comment* the two reports of petitioner’s cardiologist (*see*, Ver. Ans. Ex. 20, Med. Bd. Report, Oct. 18, 2002, ¶ 4; Ex. 22, Med. Bd. Report, June 20, 2003 ¶ 4). On June 17, 2002, Dr. Hershman wrote that he was “shocked and amazed” at the denial of

---

<sup>5</sup>The Medical Board noted that the February 13, 2002 report did not mention the amount of exercise (Ver. Pet. Ex. B, ¶ 4).

<sup>6</sup>The Medical Board noted that the September 26, 2002 report did not indicate the amount of exercise or petitioner’s hemodynamic response (Ver. Pet. Ex. H; Ver. Ans. Ex. 19 ¶ 4).

petitioner's application for ADR, reviewed petitioner's condition, noting that a thallium stress test showed ischemia and an angiogram showed segmental wall motion abnormality, stated that his blood pressure is "out of control" and conjectured that it posed "an inordinate risk" to his health (Ver. Ans. Ex. 16). On January 3, 2003, Dr. Hershman explained that the "hypertensive heart disease" is under control through medication, that the September 2002 stress test showed probable ischemia and a March 2002 angiogram showed a below-normal ejection fraction by the coronary arteries, and noted that he was "rather shocked" at the denial of petitioner's application for ADR "based on the objective findings of ischemia on stress testing and his symptom complex," and stated that his working diagnosis is "hypertensive heart disease and possible Syndrome X" (Ver. Pet. Ex. I).

Respondents argue that the Medical Board is entitled to rely on its own expertise in evaluating the evidence and reaching its conclusions, after considering the views of petitioner's physicians (Resp. Memo of Law, p. 23, citing among others, *Tobin v Steisel*, 64 NY2d 254, 258 [1985]). They argue that when resolving a conflict in medical opinion concerning the interpretation of diagnostic tests, the Board of Trustees's determination to rely on the Medical Board's own medical expertise is not arbitrary or capricious and should not be disturbed (Resp. Memo of Law, p. 23, citing, among others *Spiro v Ward*, 159 AD2d 225, 226 [1<sup>st</sup> Dept. 1990] [when "confronted with a conflict of medical opinion, the Board of Trustees is entitled to rely upon the unanimous opinion of the members of the Medical Board"]; *Manza v Malcolm*, 44 AD2d 794, 795 [1<sup>st</sup> Dept. 1974]). They contend that a difference in medical opinion does not mean that the Board's determination was arbitrary or capricious, citing among others, *Muffoletto v New York City Employees' Retirement Sys.*, 198 AD2d 7, 7 (1<sup>st</sup> Dept. 1993), and *Matter of Cassidy v Ward*, 169 AD2d 482, 483 (1<sup>st</sup> Dept.

1991).

At the very least, the medical evidence establishes that during the years that he worked as a police officer, petitioner developed hypertension, apparently under control at this time, dyspnea, and possible ischemia as conceded by the Medical Board in April 2002. *It is unclear why the Medical Board appears to have ignored its own finding of possible ischemia.* Moreover, it is not clear whether the Medical Board placed less emphasis on the two stress tests, both of which concluded there was probable ischemia, and one of them which showed evidence of a non-transmural infarction, because the reports failed to indicate how long petitioner exercised. Indeed, it appears that although the test protocol was of concern to the examiners, they did not request further information or a follow-up test, and it unclear how the Medical Board chose to evaluate the results of those two tests.

Petitioner has included a report dated March 3, 2003, by a second cardiologist, Dr. Edward T. Davison, which apparently the Medical Board was not given to review (Ver. Pet. Ex. J). Dr. Davison examined petitioner, noting that his blood pressure was 115/75, and that an electrocardiogram revealed a regular sinus rhythm and a score within normal limits. The doctor stated that petitioner was “well controlled” at the time on a calcium-blocking agent and ACE inhibitors, did not “demonstrate any significant hypertensive changes on echo, although the stress test certainly is consistent with hypertensive heart with a positive thallium in the absence of no significant coronary disease,” and recommended that he should lose weight, continue a low-salt diet, undergo a complete cholesterol profile, and obtain “appropriate treatment to meet NCEP guidelines” for his hypertension.

Where there is conflicting evidence and medical reports presented to the Medical Board, it is

solely within the province of the Board and the Board of Trustees to resolve the conflict (*Matter of Manza v Malcolm*, 44 AD2d at 795). Here, however, where the record is unclear as to the import of the two stress tests, and where the Medical Board *did not explain its apparent dismissal of its own finding of possible ischemia*, in the interest of justice, the petition must be granted to the extent that the matter be remanded to the Medical Board so that a proper nuclear stress test can be performed which fully meets the requirements of the examiners, meaning a report which includes the length of time petitioner exercised and his hemodynamic response. Moreover, to the extent that the Board is ignoring its own findings of ischemia, such decision should be explained. Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent that the decision denying petitioner ADR is annulled and the matter is remanded to the Medical Board Police Pension Fund Article II for it to reconsider its findings after a new nuclear stress test, the report of which must include the length of time petitioner exercised and his hemodynamic response.

This shall constitute the decision, order and judgment of this court. Courtesy copies of this decision are being mailed to counsel.

Dated: November 14, 2005  
New York, New York

*Paul H. Timina*  
J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Office (room 141B).

NOV 25 2005  
CLERK'S OFFICE  
141B

**FILED**  
NOV 25 2005  
COUNTY CLERK'S OFFICE  
NEW YORK  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Office (room 141B).