

Matter of Meehan v Kelly
2006 NY Slip Op 30593(U)
October 16, 2006
Supreme Court, New York County
Docket Number: 106412/2005
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN

PART 52

Justice

1/m/o Barbara Meehan

INDEX NO. 106472/05

MOTION DATE 8/2/2006

MOTION SEQ. NO. 002* (formerly 001)

MOTION CAL. NO. 9

- v -

Raymond Kelly, et al.

The following papers, numbered 1 to 5 were read on this motion to/for Article 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1-3

4, 5

Cross-Motion: Yes No

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

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 Desk (Room 1415).

Dated: 10/10/06

SHF

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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
BARBARA MEEHAN,
Petitioner,

Index Number 106412/2005
Submission Date Aug. 2, 2006
Mot. Scq. No. 002
Mot. Cal. No. 2

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

- against -

**DECISION, ORDER AND
JUDGMENT**

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 Fund, Article II, NEW YORK CITY POLICE
DEPARTMENT and THE CITY OF NEW YORK,
Respondents.

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 Desk (Room
141B).

-----X
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Papers considered in review of this petition to annul:

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	<u>1</u>
Petitioner's Memos of Law.....	<u>2, 3</u>
Verified Answer.....	<u>4</u>
Respondent's Memo of Law.....	<u>5</u>

PAUL GEORGE FEINMAN, J.:

In this Article 78 proceeding, petitioner seeks to annul and reverse the determination denying her accident disability retirement benefits, pursuant to CPLR 7803 (3). For the reasons which follow, the petition is denied and the proceeding is dismissed.

Factual and Procedural Background

Petitioner was appointed to the New York City Police Department as a uniformed officer on July 5, 1989 and served until her retirement for ordinary disability (Ver. Pet. ¶ 4). She seeks a judgment reviewing and annulling the action by respondents who denied an accident disability retirement allowance (“ADR”) pursuant to New York City Administrative Code § 13-252, and a declaration that such action was arbitrary, capricious, unreasonable, and unlawful, and directing that respondents retire petitioner with an ADR allowance retroactive to the date of her retirement or, in the alternative, for a remand of the matter to respondents for further consideration.

Over the course of years as a police officer, she sustained several injuries including several to her left and right hands and digits, and to her neck and back, for which she generally received medical care (Ver. Pet. ¶ 6). In total, she suffered 14 line of duty injuries (Ver. Ans. Ex. 1). One of the more severe injuries occurred on May 31, 1995 when the RMP vehicle in which she was a passenger was struck twice and she suffered soft tissue injury to her neck and back, for which she was treated and issued a neck brace (see Ver. Pet. Ex. N [accident report and medical record]). The most recent line of duty injury occurred in April 1999. However, she has sought treatment over the past several years for a set of symptoms which even respondents agree have become disabling. The diagnosis of her condition, as seen in the medical records submitted by both parties, has changed over time as her doctors’ understanding of her condition changed.

Between November 19, 1997 and June 7, 1999, petitioner visited a chiropractor 14 times, first with complaints of pain in her neck, head, and left arm, and later, of pain in the right side of her neck and down her right back and arm (Ver. Pet. Ex. D). X-rays of her cervical spine conducted on December 11, 2000 in connection with treatment of “chronic neck and back pain” showed “essentially normal” bone density and quality, but a “100% loss/reduction of the normal cervical

*Formerly calendared as Motion Sequence 001.2

lordotic curvature suggesting the presence of myospasm of the paravertebral musculature,” and “reversal of the normal cervical curvature at the level of C2-C3,” forward skull displacement, disc wedging at C3-C4 and C4-C5, and multiple phase 1 subluxations (Ver. Pet. Ex. G).

On January 25, 2001, petitioner began a course of treatment for bilateral carpal tunnel syndrome, at which time she was advised by her treating physician to go on limited duty (Ver. Pet. Ex. H). The periodic “Treating Physicians Summary Reports,” completed by the police surgeon between February 20, 2001 and October 4, 2002, show that over the months, the surgeon’s diagnosis evolved from bilateral carpal tunnel syndrome, to compressive neuropathy, cervical radiculopathy, and myofascial pain, herniated cervical disk, to Reflex Sympathetic Dystrophy (Ver. Pet. Ex. I). For a period of time, she wore a brace on her right hand and stated that she was unable even to hold a cup of coffee (see, e.g., Ver. Ans. Ex. 8, report of 5/10/01; Ex. 9, reports of 7/9/01 - 8/20/01). The surgeon initially believed petitioner could return to limited duty, i.e., desk work, but that the prognosis for a return to full duty was guarded; over the months of treatment, the prognosis for a return to full duty dimmed, and a return to limited duty would be restricted to no lifting, carrying, or using the telephone without a headset. By October 4, 2002, the surgeon wrote that petitioner was unable to function without pain and recommended against her working even limited duty as she could not use her left arm, could not engage in physical activity, was hypersensitive, extremely weak, and had poor mobility in her left hand.

She was seen by an orthopedist, Verghese George, M.D., in November 2001, who wrote that she complained of “tingling, numbness, and weakness in both her hands.” (Ver. Pet. Ex. K). Dr. George, whose specialty is in hand surgery, found no obvious deformities in her fingers or hands, that her fingers fully extended and flexed, as did the thumbs, with no wasting of any muscles, and

normal tendon gliding. There was a positive Tinel Sign and Phalen's Test, and a negative Finkelstein's Test, with sensitivity bilaterally over the ulnar nerve and cubital tunnel. She also had a "definite lump in the trapezial region on the left side," and evidenced discomfort moving her neck, "more so on the left side." Dr. George diagnosed petitioner with "[c]ompressive neuropathy, upper extremity with possible cervical radiculopathy" (Ver. Pet. Ex. K).

An MRI of the cervical spine in December 2001 revealed "straightening cervical lordosis" and "prominent annulus, C4-5 and C6-7" (Ver. Pet. Ex. L). A neurosurgeon evaluated her in March 2002 and found that she did not require neurosurgical intervention and should have physical therapy (Ver. Pet. Ex. P). She undertook two courses of physical therapy consisting of 12 sessions, from May through early September 2002 (Ver. Pet. Ex. R).

On three separate occasions in 2001 and 2002, the last on April 17, 2002, she was deemed "medically unable to attempt firearms qualifications" by the Commanding Officer of the NYPD Medical Division (Ver. Pet. Ex. J, emphasis in original).

Petitioner applied for Accident Disability Retirement (ADR) on April 24, 2002, on the basis of severe neck pain due to cervical derangement caused by "numerous LOD" injuries, and specifically based on the May 31, 1995 RMP vehicle accident; the Police Commissioner submitted an application on her behalf for Ordinary Disability Retirement (ODR) (Ver. Pet. ¶ 22; Ver. Ans. Ex. 13).¹

In May 2002, she was evaluated by Dr. Anthony R. Grasso who noted her cervical and lumbar pain and radiculopathy, and recommended continuing her on "light duty status," and that she

¹On June 4, 2002, her three firearms were taken from her for safeguarding "by direction of the Medical Division due to the Officers [sic] Disability." (Ver. Pet. Ex. S).

might be a candidate for epidural and/or facet joint injections (Ver. Pet. Ex. Q). On July 5, 2002, she underwent another MRI of the cervical spine. The doctor's report interpreting the MRI found "mild disc bulges" at C4-5 and C5-6, and a herniation at C6-7, and no evidence of spinal cord compression or central spinal canal stenosis or foraminal stenosis (Ver. Pet. Ex. U).

Petitioner was evaluated by an orthopedist, Dr. David Weissberg, on July 12, 2002, who noted that she had been told that she had carpal tunnel syndrome and that surgery had been recommended, and that she had also been told she primarily had a "neck problem" with herniations and loss of cervical lordosis (Ver. Pet. Ex. V). She informed him that about three weeks earlier she had increasing pain on the left side of her neck. His examination found positive Tinel's signs bilaterally and positive Phalen's signs bilaterally. His impression was chronic cervical radiculitis "with possible double crush phenomenon and carpal tunnel syndrome as well as low back syndrome."

On July 31, 2002, Dr. Weissberg signed a disability certificate for the period of July 12 to August 12, 2002, advising her only to do light duty work to aide in recovery (Ver. Pet. Ex. W). A second certificate was signed on August 15, 2002, indicating that she was to continue on limited duty "until further notice" (Ver. Pet. Ex. X).

On September 4, 2002, her physical therapist wrote of his concern "regarding the increase in symptoms in [petitioner's] left arm," noted that the symptoms she exhibited were similar to those of Reflex Sympathetic Dystrophy, and recommended that she schedule a consultation with a pain management specialist in combination with physical therapy (Ver. Pet. Ex. Y).

Petitioner was returned to Full Duty on September 5, 2002, but put on restricted duty as of September 9, 2002 (Ver. Pet. ¶ 32; Exs. Z, AA ¶ 3).

On November 12, 2002, the Medical Board Police Pension Fund, Article II issued its first denial of petitioner's application following its examination of petitioner (Ver. Pct. Ex. AA). The report noted her history and the nature of her complaints, stated that its review of cervical spine x-rays, "which have shown disc bulges at C4-C5, C5-C6, and C6-C7," showed "adequate subarachnoid spacing" with "no evidence of cord compression, displacement," or "any evidence of root compression." (Ver. Pet. Ex. AA ¶ 5), and noted that she was not on any medication at the present time except for an occasional Vicodin. It stated that her examination showed a limited range of motion but no evidence of spasm or pain upon palpation. The left hand "was held in a stilted fashion with the fingers spread apart and the inability to bend." Dorsiflexion of the left wrist was 4/5. Her left hand showed "no discoloration nor . . . any atrophy or trophic changes of the skin and nails. . . . Passive flexion of the fingers caused pain." The circumferences of both her arms and forearms were equal and symmetrical (Ver. Pct. Ex. AA ¶ 7). Based on the examination, the doctors concluded that petitioner had failed to demonstrate an orthopedic disability precluding her from performing full duty.

Petitioner remained on restricted duty, under the medical supervision of Dr. Weissberg who continued to treat her for cervical radiculopathy and RSD (Ver. Pet. Ex. CC, EE).

On September 2, 2003, petitioner appeared before the Medical Board for a second time, having submitted additional medical records for visits made after the initial denial. Thus, the Medical Board was able to consider a CT-scan of her cervical spine taken in December 2002, which showed C5-C6 disc bulge and C6-C7 central and right sided disc herniation (Ver. Pet. Ex. BB). It was also able to evaluate a March 14, 2003 report written by Dr. Weissberg which, in addition to detailing her treatment history and stating that her symptoms were increasing at that time, disputed

certain statements made by the November 12, 2002 Medical Board report (Ver. Pet. Ex. DD). Among other statements, Dr. Weissberg explained that the reason petitioner was not taking any medication was due to having had complications including gastrointestinal discomfort, blurred vision, and dizziness associated with some medications. Concerning the finding of no spasm, he wrote, "I personally must refute this due to the fact that each time I palpated this woman's neck over multiple exams over multiple time periods, she had consistent spasms on palpation to the paracervical and trapezial muscles." (Ver. Pet. Ex. DD, p. 5). He further noted that although the Medical Board examiner found no discoloration of her hand or atrophy, "these findings are general findings which can come and go in patients with this disorder, and were seen on multiple occasions while I examined this patient." (Ver. Pet. Ex. DD, p. 5). The Medical Board also evaluated the report by Dr. Charles Argoff, the Director of the Cohn Pain Management Center who saw petitioner on June 4, 2003 (Ver. Pet. Ex. FF). Dr. Argoff recommended medication and the use of an intravenous nerve block.

On September 2, 2003, the Medical Board again denied petitioner's application for ADR and the Commissioner's application for ODR (Ver. Pet. Ex. GG). It noted that the December 16, 2002 CT scan of her neck showed a "small" C6-C7 disc herniation. It noted that petitioner had refused epidural steroids and the nerve block (Ver. Pet. Ex. GG ¶ 4, 5). It noted that she stated she was feeling "somewhat worse," and was taking Vicodin occasionally two times a day, more often during the week, and was taking up to six Advil a day, averaging about twenty a week (Ver. Pet. Ex. GG ¶ 7). Examination showed "some spasm and tenderness of the left trapezius muscle" but no evidence of pathological reflexes or long track signs, and motor tests were 5/5 (Ver. Pet. Ex. GG ¶ 10). It was noted that in her left upper extremity, the pinch, opposition, and grasp, varied between 3/5 and

4/5, with no evidence of give way. Measurement of both arms and forearms was equal. There was diminished sensation to light touch from approximately C4- to the T-2 dermatome (Ver. Pet. Ex. GG ¶ 10). The examiners concluded that there was no evidence of orthopedic disability which would preclude petitioner from performing her normal duties and recommended a reaffirmation of its previous decision (Ver. Pet. Ex. GG ¶ 11).

Petitioner remained under the care of Dr. Weissberg who continued to direct that she be restricted to limited duty due to RSD and cervical radiculopathy (Ver. Pet. Exs. JJ, KK, LL). On September 16, 2003, Dr. Weissberg updated his March 14, 2003 medical summary concerning his treatment (Ver. Pet. Ex. II, p. 1). He noted tenderness on palpation to the paracervical and trapezial muscles, weakness in the left upper extremity with a marked decrease in grip strength in the left versus the right, and a much cooler left upper extremity than right, consistent with RSD. In Dr. Weissberg's opinion, "she is totally and permanently disabled" and "putting this patient back to work in a full capacity as a police officer would be a cause for malpractice for the physician authorizing this return to duty" (Ver. Pet. Ex. II, p. 2).²

Petitioner also sought treatment from orthopedic surgeons, Drs. Goldman and Miller, and a Police Department neurologist, Dr. Tsirilakis, who on March 18, 2004 diagnosed her with complex regional pain syndrome (CRSD), and indicated that she should be on restricted duty and needed chronic pain management (Ver. Pet. Ex. O).

On May 18, 2004, the Medical Board reexamined petitioner based on the subsequent medical evidence (Ver. Pet. Ex. MM). It noted that the examination report of Drs. Goldman and

²He also noted that petitioner stated that the reason she did not pursue the nerve blocks was because the Police Department was unwilling to pay for hospitalization (Ver. Pet. Ex. II, p. 1).

Miller from April 14, 2004 indicated that the officer had a poor prognosis based on their findings that the left upper extremity was significantly more cold than the right, was clammy, mottled and had trophic changes of the skin, as well as increased sweatiness, and that the Police Department's neurologist diagnosed complex regional pain syndrome (Ver. Pet. Ex. MM ¶¶ 5, 6). The Medical Board's examination of petitioner found a full range of motion of the cervical spine, but that her left hand was slightly more mottled than the right, and colder than the right, that it had some tenderness and somewhat less flexion and extension when compared to the right, and that light touch was irritating, as well as heavy grasp (Ver. Pet. Ex. MM ¶ 8). Based on the documentary and clinical evidence, the Board concluded that petitioner is disabled by Reflex Sympathetic Dystrophy of the Left Hand, but that the disability is not the result of her cervical spine injury, "especially in a neck which has not undergone surgery." (Ver. Pet. Ex. MM ¶ 9). The Board noted that although she had claimed two injuries to her left hand, her application for disability benefits was based on a neck injury. It therefore recommended approval of Ordinary Disability Retirement and disapproval of Accident Disability Retirement (Ver. Pet. Ex. MM ¶ 9).

On August 9, 2004, petitioner's attorney contacted the executive director of the Police Pension Fund, seeking a remand of the proceeding to the Medical Board with the instruction that it consult with an independent specialist to determine if a causal linkage could reasonably be assumed between her accidental injuries and her subsequent diagnosis of RSD (Ver. Pet. Ex. OO). This was based on the understanding of Dr. Weissberg, who wrote on August 5, 2004, that it was "sheer lunacy" to believe that petitioner's line of duty neck injuries had nothing to do with the development of reflex sympathetic dystrophy (Ver. Pet. Ex. NN p. 2). "It is well known that an injury to any nerve can bring on reflex sympathetic dystrophy and in this particular patient, she had injuries to

multiple nerves at the region of her cervical spine, which again in my opinion with a reasonable degree of medical certainty, was the causal factor in bringing on her reflex sympathetic dystrophy.” (Ver. Pet. Ex. NN p. 2). In addition, Dr. Weissberg stated that in his “20 years of orthopedic practice, I have never seen reflex sympathetic dystrophy spontaneously occur.” (Ver. Pet. Ex. NN p. 2). He also questioned the Board’s implied statement that if only her neck had undergone surgery, the reflex sympathetic dystrophy would have been more likely to arise, and asked what was the difference between a nerve injury arising from surgery versus a nerve injury arising from a traumatic event (Ver. Pet. Ex. NN p.3).

The matter was remanded to the Medical Board although not, it appears, for consultation with an independent specialist (Ver. Pet. Ex. PP). On October 4, 2004, the Board issued another recommendation, noting that petitioner sustained six injuries involving her neck and was last on regular duty in January 2000. It stated that she said her RSD “started approximately 1 ½ years ago.” (Ver. Pet. Ex. PP ¶ 4). It also stated that according to her doctors and physical therapist, she has had RSD “since approximately 1 ½ - 2 ½ years ago” and that she could not use her left hand for any activities (Ver. Pet. Ex. PP ¶ 5). Examination found a “very limited range of motion” in her neck (Ver. Pet. Ex. PP ¶ 6). She could not make a left fist and her left hand had mild swelling and mild mottling (Ver. Pet. Ex. PP ¶ 6). The Board concluded that because the last injury to her neck was on April 22, 1998, and that the RSD symptoms took four years to manifest themselves, it “seem[s] unreasonable that the RSD, which in a four year time she had no symptoms, was due to any of her cervical spine injuries.” (Ver. Pet. Ex. PP ¶ 8). Accordingly, it reaffirmed its approval of Ordinary Disability Benefits and disapproval of Accidental Disability Benefits. Thereafter, on January 12, 2005, the Board of Trustees reviewed petitioner’s application and concurred with the

recommendation of the Medical Board and approved the Police Commissioner's application of ODR benefits and disapproved petitioner's application of ADR benefits (Ver. Pet. ¶ 50).

Petitioner timely commenced this summary proceeding on May 10, 2005, pursuant to CPLR Article 78. She argues that the action of the Board of Trustees in denying the application is arbitrary, capricious, unreasonable, unlawful, and contrary to law (Ver. Pet. ¶ 52). Prior to commencement of this proceeding, she also submitted a new application for ADR benefits, claiming disability caused by a total of eight line of duty accidents (Ver. Ans. Ex. 30). The Medical Board initially heard her application on July 5, 2005, but adjourned the hearing so that she could add information concerning a ninth injury, which occurred on April 6, 1999 to her left wrist (Ver. Ans. Ex. 33 ¶ 4). On that date, her left wrist and hand were injured when a prisoner punched and kicked her; she was taken to the hospital where her wrist was examined and x-rayed, and she received a diagnosis of a sprained left wrist and was released with instructions for taking care of it (Ver. Ans. Ex. 3-5). She reported sick from April 7 to April 11, 1999 (Ver. Ans. Ex. 1 p. 79 [petitioner's chronicle for 9/6/99 line of duty incident]).

This Article 78 proceeding was deemed withdrawn pursuant to stipulation (Ver. Ans. ¶ 78). Thereafter, on September 27, 2005, the Medical Board considered petitioner's application for ADR benefits based several line of duty injuries, in particular the one dated April 6, 1999 concerning her left wrist (Ver. Ans. Ex. 35). The Board noted petitioner's contention that her RSD started in about 2002, and pointed out that the line of duty injury to her wrist in April 1999 was three years earlier and "the three year gap between the injury and the onset of the condition again, makes it unlikely that there is a relationship between the two." (Ver. Ans. Ex. 35 ¶ 3). It reaffirmed its finding that "there were significant objective findings precluding the officer from performing the full duties of a

New York City Police Officer,” and therefore reaffirmed its recommendation that she receive ODR but not ADR retirement benefits based on a diagnosis of Reflex Sympathetic Dystrophy, left hand (Ver. Ans. Ex. 35 ¶ 4). The Board of Trustees adopted the recommendation of the Medical Board on March 8, 2006 (Ver. Ans. ¶ 85; Ex. 36).

In the interim, this Article 78 proceeding was restored to the court’s calendar by stipulation and adjourned for the petitioner to supplement her petition (Ver. Ans. ¶¶ 84, 86). Petitioner has submitted a second memorandum of law dated June 21, 2006.

Legal Analysis

Where a member of the City pension fund and retirement system applies for accidental or ordinary disability retirement benefits, the approval process involves first, a finding by a three-physician member pension fund Medical Board that based upon a medical examination and investigation of all essential information in connection with the application, the member is disabled for performance of duty and ought to be retired, and secondly, the disability is “a natural and proximate result of an accidental injury received in such city-service,” after which the Board will certify its recommendation on this issue to the Board of Trustees (*Matter of Meyer v Board of Trustees of NYC Fire Dept.*, 90 NY2d 139, 144 [1997], citing among others *Matter of Canfora v Board of Trustees of Police Pension Fund*, 60 NY2d 347, 351 [1983] [construing comparable provisions governing New York City Police Pension Fund]). The Medical Board alone has the authority to resolve conflicting medical interpretations (*Matter of Borenstein v New York City Empl. Retire. Sys.*, 88 NY2d 756, 761 [1996], citations omitted). The Board of Trustees is bound by a Medical Board finding that the applicant is or is not disabled, but if there is a finding of disability, the Trustees must then make its own evaluation as to the Medical Board's recommendation

regarding causation (*Matter of Borenstein*, at 760; see also, *Matter of Canfora*, at 351 [“function and duty of determining the ‘circumstances’ of the disqualification and of determining the amount of the allowance as provided by the [NYC Administrative Code] is conferred upon the board of trustees.”]).

In an Article 78 proceeding, judicial review of the Trustees’ determination, as with any administrative determination, is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). 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 Elec. of City of NY*, 98 AD2d 635, 636 [1st 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).

Where a petition is brought seeking Article 78 review of the denial of retirement benefits, it is well-settled that the court will not ordinarily disturb the Board of Trustee’s determination if it was based on “substantial evidence,” which the Court of Appeals has held to mean, in the context of disability cases, as “some credible evidence” (*Matter of Borenstein*, 88 NY2d at 760, citations omitted). “Credible evidence” is evidence that “proceeds from a credible source,” “reasonably tends to support the proposition for which it is offered,” and is “evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion” (*Matter of Meyer*, at 147, citations omitted). Reviewing courts may not weigh the medical evidence or substitute their

judgment for that of the Medical Board (*Matter of Borenstein*, at 760). Only where causation can be found as a matter of law, may the court disturb the ruling of the Board of Trustees when it found credible evidence to deny benefits (*Matter of Meyer*, at 145, citing *Matter of Canfora*, at 351).

Petitioner argues that the Board of Trustees's reliance on the Medical Board's recommendation was arbitrary and capricious and contrary to law because the Medical Board's reasoning revealed an apparent misunderstanding or lack of knowledge of the nature of RSD, or if it did understand the condition, then it misapplied the law by denying her ADR benefits. She seeks review and annulment of the decision, and that she be retired with an ADR pension payable retroactive to the date of her ODR retirement, together with interest, or in the alternative, a trial, or remand for a new hearing.³

In support of her argument, petitioner points to the statement by Dr. Weissberg that RSD does not spontaneously occur, and attaches two articles from the Reflex Sympathetic Dystrophy Syndrome Association website, one of which states that RSD is

an injury to a nerve or soft tissue (c.g. broken bone) that does not follow the normal healing path. The development of RSD/CRPS does not appear to depend on the magnitude of the injury (e.g. a sliver in the finger can trigger the disease). In fact, the injury may be so slight that the patient may not recall every having received an injury. For reasons we do not understand, the sympathetic nervous system seems to assume an abnormal function after an injury.⁴

³Her request for certain items of discovery pursuant to CPLR 2307(a) was apparently addressed by the inclusion of various documents in the Verified Answer, and has therefore been rendered academic.

⁴See, Pct. Memo of Law (June 21, 2006] App. A, "Clinical Practice Guidelines (Sec. Ed. Updated Oct. 15, 2000) for the diagnosis, treatment, and management of Reflex Sympathetic Dystrophy Syndrome (RSD) also known as Complex Regional Pain Syndrome (CRPS)," Anthony F. Kirkpatrick, MD, PhD, Ed.; Dept. of Anesthesiology, Univ. of South Florida, Tampa, FL (www.RSDSA.org).

Petitioner contends that the Board did not consider all the medical evidence, i.e., the clinical and diagnostic nature of RSD, citing *Matter of Brady v City of New York*, 22 NY2d 601 (1968) (where pension board failed to make its own inquiry into whether the deceased was on duty at time of his death, but relied on conclusory report of another department, matter remitted so that pension board could make “careful and painstaking assessment of all” available evidence, and make final determination when it was satisfied that “all the evidence has been fully and fairly considered.” [22 NY2d at 606]). She argues that the finding that her line of duty injuries did not cause RSD is “irrational” in that RSD by definition is trauma related, and that a denial of ADR benefits is not rationally based. It was therefore legally improper for the Board of Trustees to rely on the Medical Board’s conclusions and recommendation, citing *Matter of Borenstein* and *Matter of Meyer*. She also argues that her RSD was caused either as a result of the injuries to her neck or to her hand and that as the Medical Board explicitly held that the condition was not caused by her neck injuries, then it was medically incorrect for it not to conclude that the RSD derived from the injuries to her hand. Petitioner further argues that the Medical Board improperly failed to express its opinion as to whether any cause had been shown for her RSD or whether it only disagreed that her neck injuries, on which she had admittedly first based her application, were the cause, nor did it discuss why it disagreed with the Police Department’s own doctors as well as petitioner’s doctors that her RSD was caused by her line of duty injuries, citing *Matter of Meyer*, 90 NY2d at 147-148.

She also argues that the Board of Trustees failed to make its own determination as required concerning causation, citing *Matter of Duester v McGuire*, 81 AD2d 553 (1st Dept. 1981) (where Medical Board made no findings concerning the petitioner’s medical condition, it was arbitrary and capricious for the Board of Trustees to deny the application), and *Matter of Perkins v Board*

Trustees of the NY Fire Dept. Art. 1-B Pension Fund, 86 AD2d 808 (1st Dept. 1977) (holding that the Board of Trustees has the ultimate authority to decide whether the petitioner is entitled to a service-connected accident disability pension or to an ordinary disability pension, whose findings must be supported by the existence of credible, not arbitrary, evidence). She argues that the Trustees failed to investigate and realize that the Medical Board had not evaluated all the evidence in the manner required by *Borenstein* and *Meyer*, and failed to realize there was a lack of medical expertise on the Medical Board which required an independent specialist.

Respondents argue that there is ample credible evidence to support the January 12, 2005 determinations by the Board of Trustees that she is disabled by RSD and that it is unreasonable to infer that the RSD was caused by the injuries to her cervical spine, as the last injury to her spine occurred in 1998 and the RSD manifested in approximately 2002. Similarly, respondents argue that the March 8, 2005 determination by the Board of Trustees is also supported by ample credible evidence. The Medical Board reviewed her history, medical records, and clinical findings, and in particular the new documentation concerning the April 6, 1999 line of duty injury, and concluded that the three-year gap between that injury and the onset of the RSD made it unlikely that there was a causal factor between the two. Respondents cite *Matter of Scotto v Board of Trustees of the Police Pension Fund of the City of NY*, 76 AD2d 774 (1st Dept. 1980), *aff'd* 54 NY2d 918 (1981), in arguing that there is credible evidence to conclude that the RSD was not caused by her injuries because she returned to full duty after all of her line of duty injuries, and was at full duty for nearly two years even after the April 1999 injury. Moreover, they argue that it cannot be determined as a matter of law that petitioner's disability was the natural and proximate result of a service-related accident, citing *Matter of Meyer*, 90 NY2d at 145-146.

Petitioner's arguments concerning the sufficiency of the recommendations of the Medical Board are unpersuasive. In its May 18, 2004 recommendation, it set forth a detailed review of the reports from the various doctors and their findings concerning petitioner's medical condition as well as her condition upon physical examination, and found that the documentary and clinical evidence demonstrated that she is disabled by RSD in the left hand, but that the disability was *not* caused by the cervical spine injury based on the length of time between the injury and her symptoms. The Medical Board's report of September 27, 2005, which is the conclusion of the hearing commenced on July 5, 2005 to consider petitioner's application for ADR based on the line of duty injuries to her hands and in particular the April 1999 incident, is all together more cursory. It states only that it reviewed the history, medical records, and clinical findings. It does not set forth statements and findings of her various treating physicians. However, it concludes that the totality of the record is sufficient to support a finding of disability based on RSD. A fair reading of the September 27, 2005 recommendation is that the Medical Board did not believe the accident of April 1999, or any other line of duty injury to petitioner's hand or arm, caused the RSD, given the length of time between the accident and the onset of symptoms.

Petitioner argues that no one on the panel of the Medical Board was an expert in RSD, and that accordingly the opinions of Dr. Weissberg and the Police Department's orthopedist and neurologist should have been given more weight by the Board or, if not, then the Board of Trustees should have rejected the Medical Board's recommendation as incorrect. In *Matter of Christian v New York City Empl. Retire. Sys.*, the Court addressed the composition of pension medical boards (83 AD2d 507 [1st Dept. 1981], *aff'd* 56 NY2d 841 [1982]). In that particular situation, the Medical Board did not have an ophthalmologist although the accident involved injuries to the head and eye

and the petitioner consulted with more than one ophthalmologist. Contrary to petitioner's argument, the Court stated, "inherent in the nature and functioning of medical board is the concept that qualified physicians are able to make an informed medical judgment on the basis of information submitted to them, including the opinions of specialists in areas other than their own." (83 AD2d at 509). "The sole issue," *Matter of Christian* continues, "was one of medical judgment as to whether that event was causally connected to petitioner's later discovered disability. On that question, the Board of Trustees . . . was entitled to rely upon the opinion of the medical board." Here, as well, the issue was a medical judgment concerning whether any of petitioner's injuries were causally connected to the RSD.

Petitioner bears the burden of establishing a causal connection between her accidental injuries and the RSD (*Matter of Carney v New York City Empl. Retire. Sys.*, 162 AD2d 382, 382 [1st Dept.], *lv denied* 76 NY2d 712 [1990]). Here, she has not done so in a manner that would warrant a finding of causation as a matter of law nor in a manner that requires a further remand of her application for reconsideration. In particular, she does not establish that RSD can lie dormant in the system and manifest itself two or more years later. There is nothing in the literature, nor in the statements of any of the doctors or medical records, that sets forth the average range of time between the injury and the manifestation of symptoms of RSD. Nor does she establish that she could not have suffered some other non-job related injury, that caused her condition. The medical information proffered in petitioner's papers suggests that RSD can develop from an injury so slight that the victim would not have even noted its occurrence. Based on what is before the court, petitioner's argument concerning the causation of her disease is conjectural, and it cannot be said as a matter of law that the determination by the Medical Board or the Board of Trustees was arbitrary

or capricious or contrary to law. Moreover, as noted above, the role of the Medical Board is to assess the medical evidence and resolve any conflicts. It is not required, however, to determine the actual cause of a disability (*Matter of Mackey v Ward*, 166 AD2d 379, 379 [1st Dept. 1990]; *Bombacie v Board of Trustees*, 74 AD2d 530, 530 [1st Dept. 1980]).

Here, it should be emphasized that it is not for this court to substitute its judgment for that of the Trustees. Rather, the court's role is limited to determining whether there is any credible evidence to support the Trustee's determination denying ADR benefits. The record does not support a determination that the Trustee's actions were either arbitrary or capricious or contrary to law. Accordingly, the petition must be denied. It is therefore,

ADJUDGED and ORDERED that the petition is denied and the proceeding is dismissed.

This is the decision, order and judgment of this court.

ENTER:



Dated: October 16, 2006
New York, New York

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 Desk (Room 141B).