

Matter of Bertone v Kelly
2006 NY Slip Op 30803(U)
August 25, 2006
Supreme Court, New York County
Docket Number: 115571/05
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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In the Matter of the Application of

NICOLE BERTONE,

Petitioner,

Index No. 115571/05

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

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

Respondents.

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MARILYN SHAFER, J.:

The petitioner Nicole Bertone brings this Article 78 proceeding for a judgment annulling the action of the respondents Raymond Kelly, The Board of Trustees of the Police Pension Fund, The New York City Police Department and the City of New York (the respondents), denying the petitioner's application for a line of duty accident disability retirement allowance pursuant to Administrative Code of the City of NY (Administrative Code) § 13-252, and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and directing the respondents to retire the petitioner with a line-of-duty accident disability retirement allowance retroactive to the

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date of her ordinary disability retirement; or, in the alternative, directing a hearing on the factual issues raised herein; or, in the alternative, directing the Board of Trustees to allow the petitioner to present testimony at a hearing before the Board of Trustees.

For a period of 18 years, Bertone served as a New York City police officer, including several years as an undercover narcotics officer. While an undercover officer, Bertone was the victim of an attempted rape, and she had a razor held to her throat. On March 10, 2003, Bertone was on limited duty overseeing narcotics operations, when undercover officers Nemorin and Andrews, were shot and killed in the line of duty. While psychologically impaired, she had to coordinate efforts in response to the murders of the undercover officers. On May 24, 2004, Detective Bertone was retired on an ordinary disability pension on a finding that she suffers from a psychological disability of anxiety disorder. While in retirement, on August 12, 2005, Bertone suffered a heart attack.

In support of the petition, Bertone argues that her psychological disability is post-traumatic stress disorder, rather than anxiety disorder, and that it was the natural and proximate result of accidental injuries, entitling her to an accident disability pension as a matter of law. Bertone also argues that, had she been granted the remand she was entitled to, her application would have been active at the time of her heart attack, and she would have been permitted to amend her application to include her disabling heart condition, and would have been awarded a disability pension under the Heart Bill (General Municipal Law § 207-k).

In opposition to the petition, the respondents argue that the denial of petitioner's application for accident disability retirement is supported by credible medical evidence, and therefore, is not arbitrary, capricious or erroneous as a matter of law. It is also argued that the

petitioner is ineligible to apply for accident disability under the Heart Bill since she retired more than one year prior in time to her heart attack.

Judicial review of a determination of a body or officer is limited to whether the determination was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). In an Article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious (Matter of Borenstein v New York City Employees' Retirement Sys., 88 NY2d 756 [1996]). The Medical Board's determination is conclusive if it is not irrational, arbitrary, or capricious (Matter of Meyer v Board of Trustees of New York City Fire Dept., Art. 1-B Pension Fund, 90 NY2d 139 [1997]). In order to be eligible for retirement on an "accidental disability" pension, the petitioner must establish that she suffered mental incapacitation "as a natural and proximate result of an accidental injury received in ... city-service" (Administrative Code § 13-252). Such line-of-duty injury must be the result of a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact (Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of New York, 57 NY2d 1010 [1982]; Matter of Hipple v Ward, 146 AD2d 201 [1st Dept] appeal denied 74 NY2d 614 [1989]). It is unavailable for injuries sustained while performing routine duties, but not resulting from unexpected events (Matter of McCambridge v McGuire, 62 NY2d 563 [1984]).

In two recent cases the First Department dealt with police officers' applications for accident disability pensions based on claims of post-traumatic stress disorder. In both cases, the Court upheld the Board of Trustees' determination that the disabling post-traumatic stress disorder was not caused by qualifying conduct. In In re Pisani v Kelly (___ AD3d ___ 817

N.Y.S2d 59 [1st Dept 2006]), the Court held that the determination to deny the application was supported by uncontradicted psychological opinion that the post-traumatic stress disorder was not caused by qualifying conduct but by accumulated stress related to a series of traumatic experiences over the course of 13 years of service. In Matter of Baird v Kelly (25 AD3d 311 [1st Dept 2006]), the Court held that the campaign of harassment suffered by the police officer due to the fact that he worked undercover for a commission investigating corruption, did not constitute an accident for the purposes of recovering accident disability retirement.

Applying the above to this case, the instant determination is supported by uncontradicted psychological opinion that Bertone's disabling condition was not caused by a qualifying accident, but by accumulated stress related to a series of traumatic experiences over the course of her police department career. Inasmuch as there was credible evidence to support the Medical Board's findings that Bertone's condition, although disabling, was not the natural and proximate result of a line-of-duty injury, Bertone did not suffer a qualifying accident, the determination of the Board of Trustees was neither irrational nor arbitrary or capricious.

Turning to Bertone's claims regarding her heart condition, General Municipal Law § 207-k (the Heart Bill) creates a presumption that a disabling heart condition suffered by a police officer was accidentally sustained as a result of her employment, if not rebutted by contrary proof (Uniformed Firefighters Assn. Local 941A77, AFL-CIO v Beekman, 52 NY2d 463 [1981]). However, General Municipal Law § 207-k requires that the officer be a "paid member" at the time of the disability application and the New York City Administrative Code § 13-252, requires that the officer be a "member in city-service" at the time of the disability application. Bertone concedes that she was retired when she suffered her heart attack on August 12, 2005, but argues

that if an officer is diagnosed with a heart condition while her disability claim is pending, the Medical Board must consider an amended application under the Heart Bill.

In Matter of Mulheren v Board of Trustees of Police Pension Fund Article II (307 AD2d 129 [1st Dept], lv denied 100 NY2d 515 [2003]), the petitioner was diagnosed with heart disease during the pendency of a remand from the Board of Trustees to the Medical Board of petitioner's application for accident disability based on, inter alia, post-concussion syndrome. The Court held that the Board of Trustees should have remanded to the Medical Board for its consideration the officer's heart-related disability claim, which the officer sought to amend to include a Heart Bill claim, where the disability application for the officer was still pending before the Medical Board when he sought the amendment. It appeared that the officer's heart-related disability may have been incurred while he was still a paid member of the police department, and that the condition was not detected until after the officer retired because of a potentially faulty diagnosis, upon which he relied.

The Court wrote (307 AD2d at 134):

Therefore, in light of the particular circumstances of this proceeding, that (1) petitioner's application and the remanded Police Commissioner's application were still pending before the Medical Board when he sought to amend his application, (2) it appears that petitioner's heart-related disability may have been incurred while he was still a paid member of the Police Department, (3) the condition was not detected until after he retired, because of potentially faulty diagnoses, upon which petitioner relied, the Board of Trustees abused its discretion in refusing to remand the matter to the Medical Board for its consideration.

In the instant case, as in Mulheren, Bertone was retired when she discovered her heart disease. However, unlike the petitioner in Mulheren, on the date of Bertone's heart-attack,

August 12, 2005, Bertone did not have an application for disability pension benefits pending before the Board of Trustees. There was no application to expand to include a claim under General Municipal Law § 207-k, for the Board of Trustees then to remand to the Medical Board for its review. Therefore, Mulheren is factually inapposite to Bertone's pending Article 78 proceeding.

Accordingly, it is

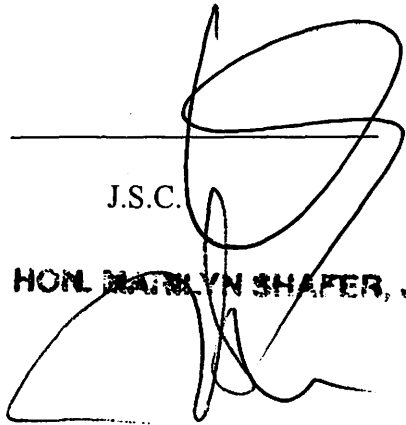
ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents.

This constitutes the decision and judgment of this court.

Dated: 8/25/06

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J.S.C.
HON. MATILYN SHAFER, JSC



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