

**Cuccio v Kelly**

2007 NY Slip Op 30442(U)

March 23, 2007

Supreme Court, New York County

Docket Number: 0116823

Judge: Eileen A. Rakower

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

PRESENT: Rakower  
Justice

PART 5

Index Number : 116823/2006  
CUCCIO, ROBERT  
vs  
KELLY, RAYMOND  
Sequence Number : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_  
Motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits -- Exhibits ...  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

1, 2  
3, 4  
5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

MAR 29 2007  
NEW YORK  
COURT CLERK'S OFFICE

Dated: 2/23/07

  
**EILEEN A. RAKOWER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
ROBERT CUCCIO,

Petitioner,

Index No.  
116823/06

For Judgment Pursuant to Article 78 of the  
Civil Practice Law and Rules

- against -

**DECISION/ORDER**

RAYMOND KELLY, as 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.

-----X  
HON. EILEEN A. RAKOWER:

**FILED**  
JUL 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Robert Cuccio (Petitioner) became a police officer with the New York City Police Department (City) in February, 1994, after successfully completing all exams and demonstrating that he was physically and mentally fit to perform a police officer's duties. In August, 1995, petitioner was involved in an arrest and suffered a left knee injury that he reported was the result of repeatedly banging his knee on the sidewalk while attempting to disarm a perpetrator who shot his partner. Shortly thereafter, in October, 1995, petitioner was involved in another on duty altercation that caused additional injury to his left knee. As a result, petitioner underwent arthroscopic surgery in August, 1996. Approximately one year later petitioner returned to full duty. Petitioner continued working at his regular duties until November, 2002, when he was involved in an off-duty car accident in which he injured his right knee. Surgery was performed in December, 2002, but because of persistent pain and discomfort, petitioner underwent a second surgery in May, 2003. Petitioner remained out of work on sick leave and in October, 2003, he filed an application for Accident Disability Retirement(ADR) benefits based on injuries that he received to his left knee as stated above. In response to his application, the Police

Commissioner filed an application for Ordinary Disability Retirement (ODR) benefits due to the off-duty injury that petitioner received as a result of his car accident.

Petitioner was first examined by the Medical Board of the Police Pension Fund (Medical Board) in April, 2003. The report focuses on petitioner's off-duty right knee injury without even mentioning his line of duty left knee injuries. The report concludes that the right knee injury was significant, it precluded his returning to the full duties of a police officer and the Board recommended approval of the Police Commissioner's application for ODR.

Petitioner did not retire, but remained out of work. He was examined by Dr. Russell Miller of the Police Department's Medical Division twice in 2004. On both occasions the doctor described petitioner's prognosis as "poor" and recommended that he be continued on sick leave.

Petitioner's ADR application was remanded back to the Medical Board "in light of new evidence to be submitted." The petitioner was examined again by the Medical Board in September, 2004. The Medical Board reported that an MRI revealed the presence of a "very small metallic fragment related to a prior gunshot injury." The report opines that "[i]t did not appear that this fragment was related to all the left knee symptoms." It notes that petitioner was still receiving physical therapy for his right knee but therapy for his left knee had stopped. The Medical Board unanimously recommended deferral of a decision pending further reports from two Police Department doctors and petitioner's personal doctor.

The Medical Board concluded its September evaluation in November, 2004, after receipt of the additional doctors' reports. It notes that petitioner's personal doctor feels that the left knee symptoms have worsened over time due to relative overuse but the symptoms are clearly related to his 1995 work injury. Upon physical examination of the left knee, the Medical Board found that there was full range of motion and no swelling. It reaffirmed its previous decision disapproving petitioner's application for ADR as to his left knee and approving ODR with regard to petitioner's left and right knee injuries. Still, the petitioner did not retire.

Petitioner's ADR application was remanded again to the Medical Board in April, 2005, "in light of new evidence to be submitted." Petitioner's personal doctor submitted another report stating that he felt arthroscopic surgery was indicated for the

left knee but it could not be performed because of the significant problems with the right knee. Petitioner, when interviewed, stated that “his left knee became symptomatic approximately 2 months after his [right knee] injury due to the fact that he was favoring his right knee.” The officer noted that he had been shot in his left knee in 1995, some fragments of the bullet remained there and even prior to the 2002 car accident he was out of work because of left knee symptoms. The Board reports that examination of the left knee was done “cautiously” due to the Officer’s symptomology. The Medical Board reaffirmed its previous decision disapproving petitioner’s application for ADR as to his left knee and approving ODR with regard to petitioner’s left and right knee injuries.

By letter dated August 8, 2005, petitioner’s counsel wrote to the Police Pension Fund’s Board of Trustees requesting that petitioner be retired on ODR with the caveat that the Board of Trustees retain jurisdiction over the ADR portion of the disability retirement application to be reviewed again within 90 days in light of new medical evidence to be submitted. The officer retired. Petitioner submitted a second application for ADR on September 2, 2005. This application stated that he had received a line of duty injury to his left knee and, “[a]s a result of pain and the retained bullet fragments in [the] knee,” he was unable to perform full police duties.

The now retired officer was reexamined by the Medical Board in October, 2005. The Board again reviewed previously submitted documentation, a new report from petitioner’s doctor, and re-interviewed and re-examined the petitioner. Petitioner stated in his interview that he has had left knee pain ever since his 1995 injury, he has constant left knee pain now and his knee has gone from bad to worse. After physically examining petitioner, the Medical Board again unanimously recommended disapproval of petitioner’s application for ADR and continued approval of ODR.

Petitioner now seeks a judgment pursuant to Article 78 reviewing and annulling City’s denial of ADR benefits, a declaration that its action was arbitrary and capricious and an order directing City to retire petitioner with ADR benefits. In the alternative, Petitioner requests a hearing on the factual issues presented here, or a direction that the Board of Trustees allow petitioner to present testimony at a hearing before the Trustees to prove his entitlement to ADR benefits.

The judicial review of an administrative determination is limited to the grounds invoked by the agency. (*Lindemann v. American Horse Shows Assn.*, 222 A.D.2d 248,

250 [1<sup>st</sup> Dept. 1995]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. V. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1<sup>st</sup> Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. V. Glasser*, 30 N.Y. 2d 269 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

"In an Article 78 proceeding challenging [a] 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 System, et al.*, 88 N.Y. 2d 756 [1996], citations omitted). Additionally, "a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence. While the quantum of evidence that meets the 'substantial' threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require "some credible evidence." (*Id.*)

Often the medical evidence submitted by a retiring officer is subject to conflicting interpretations. If the Medical Board's report regarding the officer's disability differs from the medical opinions of petitioner's doctors, the Board of Trustees is "entitled to rely upon the unanimous opinion of the members of the Medical Board."(*Matter of Spiro v. Ward*, 159 A.D.2d 225 [1<sup>st</sup> Dept. 1990]); *Matter of Quilty v. Ward*, 193 A.D.2d439 [1<sup>st</sup> Dept. 1993]; *Matter of Vecchiarello v. Board of Trustees*, 115 Misc.2d 241 [Sup. Ct. N.Y. Cty. 1982]"

Here, the disagreement is as to the impact of Petitioner's 1995 line of duty injuries to his left knee. The issue before the board was whether it is the left knee injuries that have left him incapacitated, or whether those old injuries, which otherwise may not have disabled petitioner, have been irritated and exacerbated by Petitioner's off duty car accident. The car accident left him with injury to his right knee, which the board concedes is a disabling injury.

While Petitioner's August 8, 1995 injury left a bullet fragment lodged in his left knee, the injury was not so severe as to prevent the officer from returning to full duty shortly after the incident. Indeed, the presence of the bullet fragment, first

detected in an August 30, 1996 MRI, was so inconsequential that Petitioner did not appear to be aware of it, stating in his first application for ADR that his left knee was injured when it was “repeatedly banged on sidewalk during scuffle [sic].” Petitioner’s October 1, 1995 line of duty incident re-injured his left knee, and required surgery and nearly a year of rehabilitation before he was able to return to full duty. Thereafter, notwithstanding Petitioner’s later statements that he had repeated problems with his left knee, he continued as an active officer on full duty until his November 20, 2002, off duty car accident.

Having visited and revisited the issue of Petitioner’s left knee injuries, it is clearly the unanimous opinion of the Medical Board that his left knee problems are not the basis of his present disability. Instead the Medical Board finds that it is Petitioner’s off duty right knee injury and the surgeries associated with that which have resulted in the officer’s disabled condition. The right knee injury exacerbated the left knee pain. Indeed, Petitioner’s own doctor writes in a letter dated November 3, 2004 that the “[l]eft knee symptoms have worsened with time due to relative overuse.”

While the determinations of the Medical Board are at odds with the opinion of Petitioner’s doctor, the Board of Trustees is entitled to accept the Medical Board’s findings which are rational and supported by credible evidence. (*Matter of Borenstein v. New York City Employees’ Retirement System, et al., supra; In Re Richard Locke v. Raymond Kelly, as Police Commissioner of the City of New York*, \_\_\_ A.D.3d \_\_\_, [1<sup>st</sup> Dept. 2007], N.Y.L.J., March 22, 2007, at 25, col.3). Under the circumstances of this case, it cannot be said that the Board of Trustees’ decision was arbitrary and capricious.

Wherefore it is hereby

ORDERED that the petition seeking a declaration that the Actions of the New York City Police Department’s Board of Trustees action was arbitrary and capricious and an order directing City to retire petitioner with ADR benefits is denied.

All other relief requested is denied.

This constitutes the decision and order of the Court.

Dated: March 23, 2007



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Eileen A. Rakower, J.S.C.

**FILED**  
MAY 10 2007  
HARRISON  
COUNTY CLERK'S OFFICE