

Matter of Koster v Kelly
2007 NY Slip Op 30628(U)
April 5, 2007
Supreme Court, New York County
Docket Number: 0111206/2006
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN

Justice

PART 52

Index Number : 111206/2006

KOSTER, PETER

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO.

111206/2006

MOTION DATE

1-10-07
001

MOTION SEQ. NO.

MOTION CAL. NO.

6

Motion to/for _____

PAPERS NUMBERED

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

1,2

Answering Affidavits — Exhibits _____

3,4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*petition is decided
in accordance with annexed decision
of the court.*

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 41B).

Dated: 4/5/07

[Signature]

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 PETER KOSTER,
Petitioner,

Index Number 111206/2006
Mot. Submit Date Jan. 10, 2007
Mot. Seq. No. 001
Mot. Cal. No. 6

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.

-----X

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For the Respondents:
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Papers considered in review of this petition to annul:

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

PAUL G. FEINMAN, J.:

In this Article 78 proceeding, petitioner seeks review of respondents' denial of an
accident disability retirement allowance pursuant to General Municipal Law § 207-k on the
ground that it was arbitrary and capricious, unreasonable and unlawful (CPLR 7803[3]). In the
alternative, petitioner seeks a hearing or a remand to the Board where he can present testimony to

establish his entitlement. He also seeks, pursuant to CPLR 2307(a), an order directing respondents to provide him with specific documents. For the reasons which follow, the petition is granted in part and denied in part.

Factual Allegations

Petitioner was appointed to the New York City Police Department (NYPD) in July 1989, after having demonstrated his physical and mental fitness to perform full duty as an officer by passing the examinations administered by the NYPD (Ver. Pet. ¶ 4). In March 1996, he first evidenced the physical condition which lead to his retirement, when he passed out and fell on the desk at work, cutting his face and breaking teeth, suffering a line of duty injury (Ver. Pet. Ex. A, Injury Report). Then on October 8, 2002, after struggling with a prisoner, he felt lightheaded and collapsed to the ground and suffered at least two seizures (Ver. Ans. Ex. 6, Line of Duty Injury Report at 1). On October 10, 2002, petitioner's treating physician, Dr. William Ross, provided a summary report to the NYPD's medical division, stating that petitioner was diagnosed with "syncope (vasovagal) & syncope induced seizure," and that his prognosis for return to full duty was "guarded at this time" (Ver. Ans. Ex. 9).

A neurologist examined him on October 11, 2002, and performed a CAT scan of the brain, an MRI, and a CAT scan of the chest, all of which were normal (Ver. Pet. Ex. B, Haimovic MD Report). The neurologist stated that petitioner was neurologically normal and that he suffered from convulsive syncope, and ordered an EEG. A specialist in cardiac diseases and cardiac electrophysiology then examined petitioner on November 4, 2002 (Ver. Pet. Ex. C, Goldner MD Report). Dr. Goldner noted that the EEG results were normal. An EKG also proved to be normal. A nuclear stress test showed slight left ventricular dilatation and no

ischemia. Dr. Goldner's impression was that the syncope was vasovagal in origin (Goldner Report at 2) . He noted that the second incident occurred when petitioner was "sleep deprived, tired, fatigued, and dehydrated with nothing to eat" (Goldner Report at 1), and suggested rather than medications, petitioner make lifestyle changes, including finding another job where he could more easily remember to drink sufficient fluids, "as it is quite clear in this last episode he did not drink any fluids prior to his going out [on duty]" (Goldner Report at 2). An exercise electrocardiogram (stress test) undertaken on November 7, 2002 found "[e]xcellent exercise performance," and that after 15 minutes, petitioner had normal blood pressure response, and normal stress electrocardiography (Ver. Pet. Ex. E, at 2). There was no stress induced ischemia. There was, however, "[a]bnormal myocardial perfusion imaging," and although there was normal wall motion and systolic thickening with "overall LVEF 50%," and tracer uptake "consistent with non-specific cardiomyopathy" (Ver. Pet. Ex. D, Steinberg MD Report).

An echocardiogram on November 14, 2002 revealed mild left atrial enlargement and mild to moderate mitral regurgitation and normal left ventricular systolic function, internal dimensions and wall thicknesses (Ver. Pet. Ex. E).

On November 26, 2002, petitioner consulted with Dr. Stanley Katz, a cardiologist, who wrote to petitioner's treating physician following the examination that in his opinion, the stress test was normal, the echocardiogram recently performed was "essentially normal with mild to moderate mitral regurgitation . . . [and] normal LV function and normal dimensions." (Ver. Ans. Ex. 15). Dr. Katz noted that petitioner's lungs were clear, he could not hear any murmurs upon auscultation of his heart, and his blood pressure was 144/94. The doctor noted that told petitioner and his wife, "I don't think anything needs to be done." He did urge petitioner to repeat

the echocardiogram in about 19 months.

Petitioner's treating physician, William Ross, M.D. summed up petitioner's medical history in a letter dated January 17, 2003, describing the tilt table test results following the 1996 episode as revealing "a neurocardiogenic syncope (vasovagal syncope)," and agreeing with Dr. Goldner's October 2002 assessment that petitioner seek another job because his condition put himself and others in danger (Ver. Pet. Ex. F). Dr. Ross stated that he "consider[ed] his condition to be a work-related disability," and that it was "clear that this is a heart-related disability that is precipitated by the stress of the job," noting that the condition was not present before petitioner joined the police force.

On January 29, 2003, Dr. Goldner wrote to Dr. Ross following a consultation that he was concerned about allowing petitioner to return to his work as a detective, given that there is no cure for vasovagal syndrome, medication is not totally protective, and that he could have an episode and pass out at any time, endangering himself and potentially others (Ver. Pet. Ex. G).

Petitioner filed an application for Accident Disability Retirement (ADR) pursuant to General Municipal Law § 207-k, commonly referred to as the "Heart Bill." In conjunction with his application, the Police Commissioner filed an application on petitioner's behalf for Ordinary Disability Retirement (ODR).

Petitioner was examined by the Medical Board Police Pension Fund, Article II ("Medical Board") on August 23, 2003 (Ver. Pet. Ex. H). The Board's three physicians noted his complaint of a heart condition. The Board's report set forth petitioner's medical history. It noted that the echocardiogram report from January 2001 showed "mild MR on a doppler study" and mild left atrial enlargement but no evidence of left ventricular hypertrophy. The Board discussed the

medical results of tests after petitioner's 2002 episode, including CT scans of his head, and noted that EKGs showed normal sinus rhythm without significant abnormalities. It noted the discussion of vasovagal syncope in the documentation. It noted Dr. Goldner's comments that petitioner had not eaten anything and slept poorly before the second episode and that this "might have had something to do with" the attack, and that he needed to always be attentive to his salt, water, and food intake, to minimize future episodes. In discussing the echocardiogram report of November 14, 2002, the Board stated that the estimated pulmonary artery systolic pressure was not "overly significant." Although the echocardiogram of May 2003 "show[ed] mild polyvalvular disease consisting of mild MR, mild AI, mild TR and mild pulmonary insufficiency," it also showed "normal left ventricular and right ventricular size and systolic function without regional variability." The Board noted that the mitral doppler inflow was "abnormal and consistent," but was "not specific for diastolic dysfunction"; "mild left atrial enlargement" was also found. The report described other documents as well (see para. 11).

The Board's doctors interviewed the petitioner, and noted that he had been on restricted duty since December 1, 2002. Petitioner mentioned a one-time episode of chest pain at the same time he noted the onset of paresthesias in his hands and feet (Para. 12). He reported "occasional palpitations." He told the doctors that he limited his activities but was "mildly to moderately" active, was on no medication, and had no risk factors for cardiac disease other than a slightly elevated cholesterol (Para. 12). Physical examination found a regular pulse, negative findings in his chest and heart including no murmurs or abnormal sounds, equal carotid arteries without bruit, no edema in the lower extremities, and palpable distal pulses. Based on the exhibits, current history, and physical examination, the Board's unanimous conclusion was that petitioner

was disabled and recommended ODR, with a diagnosis of "Syncope on a Vaso Vagal Basis," but not ADR.

Petitioner's application was remanded for review which was conducted by the Medical Board on February 13, 2004 (Ver. Pet. Ex. J). The Board took note of new evidence from petitioner's treating physician Dr. Ross concerning petitioner's unchanged condition as of February 2004 and the doctor's continuing recommendation that petitioner not return to work due to vasovagal syncope. Petitioner told the Board that he had had no further episodes of loss of consciousness but that he was cautious about exerting himself; had experienced some lightheadedness, once felt "woozy" after standing for about 10 minutes, and was sometimes aware of his heart beat. Physical examination was unremarkable except that his pulse had occasional premature beats. Based on all the evidence, the Board reaffirmed its earlier decision to approve ODR and deny ADR.

A third review of petitioner's application was made on January 20, 2006 (Ver. Pet. Ex. L). Petitioner did not appear, however Dr. Ross had submitted another letter, dated June 22, 2004, expressing his belief that petitioner had a cardiac condition and was unfit to perform full work. The Board again reaffirmed its decision, and recommended approval of the application for ODR but not the application for ADR.

The Board of Trustees Police Pension Fund Article II (Board of Trustees) reviewed petitioner's case on April 12, 2006 and concurred with the recommendation of the Medical Board that the application for ODR be approved (Ver. Ans. Ex. 23).

Petitioner commenced this special proceeding seeking to annul the determination of the Board of Trustees and for a determination that he is to be retired with an ADR pension under the

provision of General Municipal Law § 207-k, or for a trial or a new hearing. Respondents oppose and argue that petitioner has failed to establish that his condition was related to his heart and therefore may not recover under the Heart Bill.

Legal Analysis

In Article 78 proceedings, judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). 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). Furthermore, 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. 1984]).

It is well-settled that the Board of Trustees of the Police Pension Fund is bound by the Medical Board's determination of disability (*Matter of Borenstein v New York City Employees Retirement Sys.*, 88 NY2d 756 [1996]). The Board's determination will not ordinarily be disturbed if the determination is 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). Where the medical evidence is conflicting, it is the sole province of the Medical Board to resolve the conflict (*Matter of Borenstein*, at 760).

Reviewing courts may not weigh the medical evidence or substitute their judgment for that of the Medical Board (*Matter of Borenstein*, at 760). It is incumbent on the Medical Board at least to evaluate the evidence submitted by the petitioner (*see, Mininni v The New York City Empls. Retirement Sys.*, 279 AD2d 428 [1st Dept.]), *lv denied* 96 NY2d 722 [2001]).

Ordinary disability retirement benefits are provided to members of the New York City police department who are members of the Police Pension Fund 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). Accident disability retirement benefits are provided to members of the New York City police department who are members of the Police Pension Fund 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).

The "Heart Bill," which petitioner relies upon, 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). Under the statute, the applicant must initially establish that the disabling condition was caused by heart disease (*Matter of Appleby v Herkommer*, 165 AD2d 727 [1st Dept. 1990]). The Heart Bill then allows the presumption that the heart disease was accidentally sustained as a result of employment (*Matter of Appleby*). However, where the record contains competent medical evidence to support a conclusion by the Medical Board that the particular condition was

not related to the job of being a police officer or fire fighter, the Heart Bill's presumption will be rebutted (*see, Matter of Quilty v Ward*, 193 AD2d 439 [1st Dept. 1993]).

As in any Article 78 proceeding, the court is prohibited from substituting its judgment for that of the Board's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Gumbrecht v McGuire*, 117 AD2d 531 [1st Dept. 1986]). The court's role is to determine if there exists some credible evidence to support the findings of the Board of Trustees (*Matter of Butterworth v Bratton*, 244 AD2d 162, 163 [1st Dept. 1997] [where medical tests showed normal ejection fraction, absence of coronary artery disease, and normal ventricular wall thickness, the Medical Board could rationally conclude that the petitioner's disabling cardiomyopathy was not related to hypertensive heart disease, and therefore was not job-related, thus rebutting the statutory presumption]). Only where the determination is irrational may the court upset the Board's decision (*Matter of Appleby v Herkommer*, 165 AD2d 727).

Both petitioner and respondents agree that petitioner suffers from vasovagal syncope and that the condition is disabling. The disagreement concerns the condition's genesis and nature. Petitioner's treating physician, Dr. Ross, asserts that the condition is clearly heart-related and "precipitated by the stress of the job," apparently because the condition was not present before petitioner joined the police force. Petitioner contends that the Medical Board did not take cognizance of Dr. Ross's considered opinion, as his treating physician, and that the Board's failure to do so was arbitrary and capricious. Alternatively, petitioner argues that if the Board took Dr. Ross's opinions into consideration but decided that his reasoning was medically incorrect, then it had a duty to articulate its disagreement or at the very least, to explain its recommendation otherwise (Pet. Reply Memo. of Lat at 10, citing *Matter of Meyer v Board of*

Trustees of New York City Fire Dept., 90 NY2d 139, 145 [1997]).

It is the role of the Medical Board to determine whether or not an applicant seeking a disability pension has a condition that is disabling, and its determination will be binding (*Borenstein*, 88 NY2d at 760 [“If the Medical Board certifies that the applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny applicant's claim. The Board of Trustees is equally bound by a Medical Board finding that the applicant is disabled, but in that event it must then make its own evaluation as to the Medical Board's recommendation regarding causation.”]). Respondents argue that the Medical Board determined, after an assessment of all the evidence, that petitioner was disabled due to syncope that was not heart related, and which developed for unknown reasons, and that there is sufficient credible evidence for this determination. They point to the Medical Board's first Report, in particular, of August 22, 2003, wherein it discusses the results of various tests in paragraphs 2,3, 5, 7-10. The report explains that the tests show no evidence of left ventricular hypertrophy and no ischemia. The report also describes other tests which show certain abnormalities including mild mitral insufficiency and mild enlargement of the left atrium, non-specific cardiomyopathy, mild to moderate mitral regurgitation, mild tricuspid regurgitation, mild polyvalvular disease, and a mitral Doppler inflow that was abnormal and consistent but not specific for diastolic dysfunction. *Without further explanation*, except for the fact that the Board members also interviewed and examined petitioner, the Medical Board concluded that petitioner's diagnosis of vasovagal syncope was not heart related.

Respondents argue that where there is a conflict in medical opinion, the Medical Board's determination to rely on its own medical expertise cannot be found to be arbitrary or capricious,

citing *Matter of Spiro v Ward*, 159 AD2d 225, 226 (1st Dept. 1990). They argue that differences in opinion between petitioner's treating physician or other physicians and the Medical Board do not constitute a basis for a finding of irrationality by the court (Resp. Memo. of Law at 10, citing *Matter of Muffoletto*, 198 AD2d 7 [1st Dept. 1993]). The Board alone has the authority to resolve conflicts in interpretation (*Matter of Scotto v Board of Trustees*, 76 AD2d 774 [1st Dept.], *aff'd* 54 NY2d 918 [1981]). They argue that the Board reviewed all of the reports of the physicians who treated petitioner, including his treating physician, as well as examined him, and that it is entitled to rely on its diagnosis and conclusions, citing *Matter of Tobin v Steisel*, 64 NY2d 254, 258 (1985).

It is not that there is a conflict in medical opinion, although there is, but that respondents have not offered sufficient evidence to the court to show that the Medical Board addressed the medical fact that syncope can be caused by a diseased heart and ruled out that cause in petitioner's case.¹ Because Dr. Ross states that petitioner's syncope is heart related and several of the medical tests show a certain amount of heart disease, the Medical Board must *articulate its reason* for finding otherwise (*Matter of Meyer v Board of Trustees*, 90 NY2d at 145). It did not do so, but only summarized the exhibits in a certain amount of detail, with occasional comments, and then proffering its diagnosis without one word of explanation. As a result, its reasoning appears arbitrary and capricious and insufficient as a matter of law. In the interest of justice, the petition must therefore be granted to the extent that the matter be remanded to the Medical Board

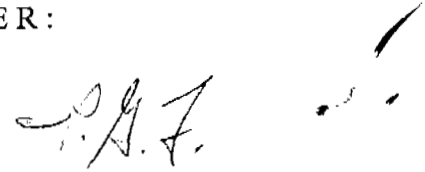
¹According to the website of the American Heart Association, syncope may be caused by "emotional stress, pain, pooling of blood in the legs due to sudden changes in body position, overheating, dehydration, heavy sweating or exhaustion. . . . It also may result from several heart, neurologic, psychiatric, metabolic and lunch disorders." (Pet. Reply Memo of Law, Ex. A).

to reassess the exhibits, in particular the reports of Dr. Ross, and issue a report that explicitly explains its reasoning concerning the nature of the vasovagal syncope. The other branches of the petition are denied either because respondents have provided the documents sought, and therefore rendered the issue academic, or because they are without merit. 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 and issue a new report which explicitly sets forth its reasons as to why it finds that petitioner's condition is not caused by heart disease, and is otherwise denied.

This shall constitute the decision, order and judgment of this court.

ENTER :



Dated: April 5, 2007
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 41B).