

**Matter of Bourihan v Kelly**

2007 NY Slip Op 30830(U)

April 17, 2007

Supreme Court, New York County

Docket Number: 0109359/2006

Judge: Nicholas Figueroa

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PRESENT: HON. NICHOLAS FIGUEROA

PART 46

Index Number : 109359/2006

BOURIHAN, DANIEL

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. 109359/06

MOTION DATE 11/21/06

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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

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

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*See accompanying decision  
and 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 141B).

Dated: April 17, 2007

NT  
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 46

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In the Matter of the Application of  
DANIEL BOURIHAN,

Index No. 109359/06

Petitioner,

**DECISION AND  
JUDGMENT**

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,  
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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**Nicholas Figueroa, Justice:**

Petitioner, a retired police officer, seeks a judgment, pursuant to CPLR Article 78, reversing and annulling respondents' denial of a line of duty disability retirement allowance under Administrative Code §13-252 and directing respondents to grant him that retirement allowance. Alternatively, petitioner seeks a hearing on the factual issues raised on the instant proceeding; or, alternatively, directing respondents to grant petitioner a new hearing on the question of his entitlement to the benefits.

Petitioner became a police officer in 1984. On September 11, 2001, petitioner was assigned to work on the World Trade Center disaster rescue and recovery efforts. He alleges that he was exposed to toxic products during the several months he worked at the site. He asserts that as a result

of the exposure, he developed thyroiditis, hypothyroidism, hypertension and ischemia, a coronary problem.

On June 17, 2003, petitioner saw Dr. Irene Weiss, an endocrinologist, and complained of fatigue, blurred vision, increased thirst and urination and a racing heart. He told Dr. Weiss that he was irritable, and could not lose weight, was sweating at night and having heart palpitations. He stated that in the last few weeks, he could no longer run seven miles a day.

Dr. Weiss's June 18, 2003 report did not note any abnormality; however, her June 23, 2003 and June 24, 2003 reports both stated, "Impression: Findings compatible with hypothyroidism."

In her June 24, 2003 note to petitioner's referring physician, Weiss stated that her impression was that petitioner had "painless thyroiditis" that may become hypothyroid. She stated that "these are usually transient, and thyroid function would return to normal."

On July 8, 2003, Dr. Kenneth Weiser examined petitioner's test results and concluded that they were "most compatible with subacute thyroiditis." Weiss concluded that petitioner's thyroid function would likely return to normal.

Dr. Viral Sheth, a cardiologist, examined petitioner on August 21, 2003. An electrocardiogram showed normal sinus rhythm. His blood pressure and pulse were normal.

A September 16, 2003 echocardiogram revealed no cardiac abnormalities. A cardiac perfusion test performed the same day stated that petitioner had atypical exertional chest pain and that his blood pressure response to exercise was hypertensive. His electrocardiogram at rest was normal; however, the perfusion scan noted a subtle defect that Dr. Sheth concluded was consistent with exercise-induced ischemia in the left anterior descending artery.

Sheth examined petitioner on October 9, 2003 and noted a small zone of septal ischemia.

He did not detect any other problems. Petitioner's blood pressure, pulse, heart rate and rhythm were normal.

Petitioner underwent a cardiac catheterization on November 3, 2003. The test revealed that petitioner's coronary arteries were normal.

A June 9, 2004 thyroid ultrasound test showed that petitioner's thyroid was normal.

Petitioner submitted his application for accident disability retirement (ADR) on July 12, 2004. He claimed that he became disabled by thyroiditis and hypothyroidism as a result of his work at the World Trade Center site and the Staten Island landfill. He stated that his symptoms of hypothyroidism, including chest pains, heart palpitations, blurred vision, irritability to concentrate and an overall feeling of malaise all developed in January, 2003.

On July 14, 2004, petitioner submitted a second ADR application under the provisions of General Municipal Law §207-K, the "Heart Bill". Petitioner claimed to have become disabled by hypertension and heart disease, including ischemia.

Petitioner retired with ordinary pension benefits on July 19, 2004. He had been on full duty, preceding his retirement.

Respondents' Medical Board examined petitioner. The Board consisted of three-physician panel, chaired by a board-certified cardiologist, Dr. Dorothy Kunstadt. The Board performed a clinical interview of petitioner and reviewed all the medical records he submitted, including Sheth's echocardiogram and perfusion studies.

The Board agreed with Sheth that the echocardiogram revealed no abnormalities, but disagreed with his impression that there was a small region of exercise-induced ischemia. The Board noted that petitioner had been on full duty at the time of his retirement.

During his interview, petitioner stated that his fatigue began in February, 2003; he attributed the fatigue to working long hours. Although petitioner said he had chest pain accompanied by a pressure-like sensation, he did not use nitroglycerine and the pain was temporary.

Petitioner stated that his pain arose after mild effort and sometimes when he was at rest; however, the pain had never occurred when he jogged. He said that since he ceased jogging, he sometimes experienced pain at the end of one-mile walks that he had begun taking; however, the pain did not force him to stop walking. Petitioner stated that he experienced chest pain a few times a month.

The Board's physical examination revealed that petitioner's blood pressure 130 over 80 and that his pulse was 84. Other than mild palm sweating, petitioner did not sweat excessively.

The examination of petitioner's chest and heart did not reveal any abnormalities. His carotid and distal pulses were normal and there was no swelling in his legs.

Petitioner's thyroid was not enlarged. It was not tender and did not contain any nodules.

The Board found that petitioner was not disabled for retirement benefits either by heart disease or thyroiditis. The Board determined that petitioner's angiography was negative. It could not confirm the presence of any significant ischemia. The echocardiogram was normal.

The Board also found that the laboratory results and the endocrinologist's opinion were consistent with acute or subacute thyroiditis, a condition that did not necessitate treatment. The Board could not find any connection between petitioner's presence at the World Trade Center and his thyroiditis.

Subsequent to the Board's decision, on October 15, 2004, petitioner had a twenty-four hour Holter heart monitor test. The predominant rhythm was normal sinus rhythm. This normal rhythm

occurred at the times petitioner said he had chest pain and pressure.

On October 27, 2004, Sheth performed a one-day myocardial perfusion test on petitioner. Petitioner complained of chest pressure, during the test. Again, Sheth said he detected a small region of exercise-induced ischemia.

On February 15, 2005 respondent Board of Trustees remanded the matter to the Medical Board to review the new evidence. Prior to that remand, Sheth, in a January 5, 2005 letter, noted that petitioner was being treated with anti-ischemic drugs and while he was showing improvement, he still had residual angina. Sheth opined that petitioner's tests revealed ischemia.

On March 5, 2005, petitioner underwent blood tests. These tests did not reveal any abnormalities.

In an April 14, 2005 note, Dr. David Brogno stated that his 2003 cardiac catheterization of petitioner did not disclose any abnormalities. He stated that he had not performed "provocative testing" because of the side of the risk of cardiac ischemia and that he did not now recommend such testing because petitioner was tolerating anti-spasmodic treatment.

The Medical Board re-examined petitioner on April 14, 2005. It also reviewed the new reports, as well as the prior ones. The Board also reviewed Sheth's October 27, 2004 myocardial perfusion scan and conducted a clinical interview of petitioner.

Petitioner stated that he was taking thyroid medication. Although he complained that he was occasionally fatigued, his most recent blood tests indicated that his thyroid function was normal. Petitioner stated that he had awakened with chest pains on March 25, 2005; however, the pain ceased when he took nitroglycerine. Petitioner also told the Board that he experienced chest pain and shortness of breath when he walked in cold weather, but avoided nitroglycerine because it caused

headaches. Petitioner revealed that he walked recreationally and that he had not been hospitalized.

The Board's physical examination did not reveal any abnormalities. The Board found that the 2004 stress test showed no significant changes from the previous one. The test demonstrated that petitioner could exercise to a significant extent without developing chest pain. The electrocardiogram was negative and the three images made during the test "do not provide evidence to a degree that would support a definitive diagnosis of ischemia." The Board noted that the new cardiac catheterization did not reveal a cardiac lesion. The Holter monitor test did not show any changes that would have occurred if petitioner had chest pains. The thyroid studies were within normal limits, when petitioner took medication. Moreover, petitioner's symptoms were not consistent with active hypothyroidism.

The Medical Board adhered to its prior determination.

On July 26, 2005, petitioner submitted a blood test result that showed a deviation from normal limits.

On August 2, 2005, Sheth wrote a letter that was submitted to respondents. Sheth wrote that petitioner had a history of coronary spasm and ischemia on non-invasive testing. He noted that petitioner had Class II to Class III angina symptoms and that, "If a coronary spasm is severe, a heart attack and sudden death is possible." He added that currently being treated with Imdur and Cardizem and that "Both medications have side effects that could also inhibit the patient's ability to perform the normal duties of a police officer." Sheth concluded that, "Therefore, I would place this patient completely disabled at this time and unable to perform the full duty as a New York City Police Officer."

Sheth's letter did not state that petitioner was disabled prior to or at the time of his retirement, a year prior to the letter.

On August 10, 2005, the Board of Trustees remanded petitioner's case to the Medical Board to review the new evidence.

The Medical Board examined petitioner on October 21, 2005. As it did on the previous two examinations, it reviewed the material petitioner submitted.

The Medical Board's October 21, 2005 report notes that petitioner began full-time work, after he retired from the Police Department. The Medical Board again noted petitioner's complaints of chest pressure and that he stated that the problem could persist for hours or days at a time. Petitioner also complained of tingling and numbness traveling from his left arm to his fingers. Petitioner stated that he had been given nitroglycerine, but that it made him feel faint and dizzy. Petitioner stated that he could walk at a normal pace without problem. Although he did not say that aerobic exercise caused any chest pain, petitioner no longer engaged in that activity.

The Medical Board reviewed Sheth's test results. It found that the two stress tests demonstrated petitioner's "excellent exercise tolerance." The Medical Board noted that petitioner's two angiographics showed no abnormalities. The echocardiogram and Holter monitor testing also "revealed no significant abnormality."

The Medical Board's physical examination showed that petitioner's blood pressure, pulse and heart sounds were normal; there were no heart murmurs. Petitioner's lungs were clear and his reflexes were active.

Based on the records and its examination, the Medical Board again reaffirmed its previous decision and recommended disapproval of petitioner's ADR application. In reading its

determination, the Medical Board again noted that petitioner was being treated for “hypothyroidism ascribed to previous thyroiditis, the etiology of which is unclear.” The Medical Board noted that petitioner's chest pain was atypical and that there was “no definite evidence of myocardial ischemia in spite of the fact that the [petitioner's] cardiologist's report of the nuclear scans indicates a small area of ischemia in the septum; however, it could not confirm Sheth's finding. The Medical Board found that the petitioner's “normal coronary angiogram excludes the presence of classic coronary artery disease.” The Medical Board found that, “As far as the putative diagnosis of coronary spasm, neither the symptoms are typical nor is there any objective evidence of it.

On March 8, 2006, respondent board of Trustees, based on the Medical Board findings, denied petitioner's applications for disability retirement benefits. Petitioner brings this proceeding to annul that determination.

Petitioner alleges that his medical evidence supported his claim of having hypothyroidism and thyroiditis. He relies on a doctor's report that reads, “The causes of thyroiditis we are not aware of. The assumption was probable exposure to some chemicals during the four years since September 11, 2001.”

The petition also notes Sheth's August 2, 2005 letter stating that petitioner suffers from coronary spasm, ischemia, and persistent class II and III type angina symptoms. Petitioner also notes Sheth's January 5, 2005 letter in which he reported that petitioner has ischemia.

Petitioner argues that the Board of Trustees failed and refused to use the proper test of entitlement to a line of duty pension, that its decision was not based on any competent or substantial evidence, and that it failed to “provide petitioner with a fair and reasonable opportunity by way of notice of hearing or otherwise to establish his entitlement to an LOD pension.”

In his memorandum of law, relying on *Matter of Brady v. City of New York*, 22 NY2d 601, petitioner argues that “the Board of Trustees has the responsibility of questioning the Medical Board in appropriate detail as to its denial of liability.” Continuing, petitioner argues that “the Board of Trustees failed to consider the evidence presented to the Medical Board and recognize the clear errors committed by the Board in formulating its determination.”

Petitioner argues that under Administrative Code §13-252.1, any injury, illness or disease contracted by an employee by exposure to elements in connection with the World Trade Center Tragedy of September 11, 2001, be presumptive evidence that, unless proven otherwise, such disability was caused by an accident in the performance and discharge of such employee's duties...” The court notes that petitioner's quotation is apparently from a source other than the Code provision; however, it is sufficiently accurate. Further, the Code provision contains a list of illnesses that qualify an individual for benefit under it; heart disease and petitioner's thyroid condition are not specifically listed among the conditions.

Petitioner contends that “The respondents' decision herein also ignores the mandate established in *Santangelo v. State of New York*, 71 NY2d 393 (1988), wherein the Court of Appeals dealt with the issue of municipal liability with respect to the recovery of damages by police and firefighters for accidents incurred in the line of duty.” Petitioner argues that the decision holds that police officers receive training that enables them to minimize the dangers their occupation requires them to face, and that compensation and special benefits help assure that the public will bear the costs of the injuries they suffer in the line of duty. Petitioner argues that he seeks to obtain this special benefit and that “He seeks an acknowledgment that the LOD [line of duty] injuries incurred during his service have caused his disability.”

In a document petitioner calls a Verified Supplemental Petition, petitioner alleges that he underwent a Myoview Nuclear Stress Test on July 14, 2006 and that the test revealed anterior ischemia. The finding is contained in a July 14, 2006 report from Dr. Shannon T. Len. The new report was never submitted to respondents during the administrative proceedings. Therefore, the court will not consider the “supplemental petition” (see *Matter of Yarbough v. Franco*, 95 NY2d 342, 347).

The standard of review of a Police Pension Fund denial of a disability pension is limited to a determination of whether there was any credible medical evidence to support the determination (*Matter of Borenstein v. New York City Employees' Retirement System*, 88 NY2d 756, 760). Moreover, the standard of review on an Article 78 proceeding is whether the decision is arbitrary and capricious; the court must affirm an administrative determination, if it is rational (see *Matter of Pell v. Board of Education*, 34 NY2d 221).

There was a rational basis for the Medical Board's finding, based on the medical evidence, on the threshold issue of whether petitioner was disabled. Therefore, the court must confirm respondents' denial of the disability pension petitioner seeks.

The Medical Board's own opinion is credible evidence when it is based on objective medical evidence or where it articulates a rational, fact-based medical explanation (see *Matter of Myer v. Fire Department Pension Board of Trustees*, 90 NY2d 139, 145). This is so, even if the Medical Board, unlike the instant case, has not conducted its own physical examination (*id.*).

Moreover, the Medical Board must first determine whether an applicant is disabled, before making the determination of whether the disability is a natural and proximate result of a service-related injury. Its determination is binding on the Board of Trustees (*Matter of Borenstein v. New*

*York City Employees' Retirement System, id.* at 760-761; *Matter of Myer v. Fire Department Pension Board of Trustees, id.* at 144). In the instant case, the Medical Board, based on all of the examinations and medical evidence, both its own and petitioner's, found that petitioner was not disabled. There is nothing in the record supporting petitioner's contention that he was unable to submit evidence or that the Medical Board failed to consider it.

Moreover, the fact that petitioner submitted evidence that he suffered from purportedly disabling conditions does not make the Medical Board's findings incorrect and does not provide a basis for judicial interference with its determination (*Matter of Muffaleto v. New York City Employees' Retirement System*, 198 AD2d 7).

The evidence the Medical Board relied on gave it a sufficient basis to find that petitioner was not disabled because by a cardiac problem. The Medical Board could not find the ischemia plaintiff's physician said he could detect. The Medical Board found that the Holter monitor and echocardiogram studies revealed no coronary abnormalities. It found petitioner was able to work as a police officer until he submitted his application for ordinary retirement after twenty years of service, and that he continued to work in another capacity after he retired. Petitioner, during his clinical interview, stated that he could walk at a normal speed and had no chest pain after aerobic exercise.

Nor was there any evidence showing that petitioner was disabled by a thyroid condition. He provided no evidence that his problem had any effect on his ability to work as a police officer.

Petitioner incorrectly argues that the Medical Board failed to explain or justify its determination. His reliance on *Brady v. City of New York*, 22 NY2d 601, in support of that argument is erroneous, as the case is inapposite. In that case, the police pension board, unlike the respondent

in the instant case, failed to base its finding on evidence. In the instant case, respondents relied on ample evidence that it reviewed on three occasions.

Nor does *Santangelo v. State of New York, id.*, provide any support for petitioner's arguments. The fact that a person may be in class of persons entitled her to a benefit does not mean that such person meets the requisite criteria for that benefit. That petitioner may have been entitled to submit a claim for benefits does not mean that he may receive these benefits without meeting the legal requirements for those benefits.

The court notes that although it is basing its determination on the fact that petitioner is not disabled, there is no sufficient evidence in the record linking his complaints to his post September 11, 2001 work.

Finally, because petitioner has been given three opportunities to present evidence in support of his claim, his request for a hearing is without merit.

Accordingly, it is

ADJUDGED that the determination is confirmed, the petition denied and the proceeding dismissed.

This constitutes the decision and judgment of the court.

Dated: April 17, 2007

ENTE  
 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).  
 J.S.C.

**UNFILED JUDGMENT**