

Matter of Markevich v Kelly

2007 NY Slip Op 31503(U)

June 1, 2007

Supreme Court, New York County

Docket Number: 0111205/2006

Judge: Marcy S. Friedman

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

PRESENT: Hon. Marcy S. Friedman
Justice

PART 57

Christophe Makouch

- v -
Raymond Kelly, et al.

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Ad 78

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
M1, M2

Cross-Motion: Yes No

Memos of Law

Upon the foregoing papers, it is ordered that this motion

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).



Dated: 6-1-07

[Signature]
J.S.C.
Hon. Marcy S. Friedman

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
NEW YORK COUNTY - - PART 57

In the Matter of the Application of
CHRISTOPHER MARKEVICH,
Petitioner,

Index No.: 111205/06

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

DECISION/ORDER

against

RAYMOND KELLY, et al.,
Respondents.

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this Article 78 proceeding, petitioner Christopher Markevich, a retired police officer, seeks to annul a decision of respondent Board of Trustees of the Police Pension Fund, approving the recommendation of the Medical Board Police Pension Fund, Article II ("Medical Board") that petitioner be retired with ordinary disability retirement benefits. Petitioner claims that he is capable of performing full duty police work and seeks reinstatement.

Petitioner served as a police officer with the New York Police Department from 1991 until his retirement in April 2006. Following the events of September 11, 2001, he was assigned to the World Trade Center rescue, recovery and clean-up work. In January 2004, petitioner sought help from the Police Department's Psychological Services for anxiety and panic attacks and was referred to psychiatrist Dr. Stanley Hertz for evaluation. Dr. Hertz diagnosed petitioner with Major Depressive Disorder, Anxiety Disorder and Binge Eating Disorder, and he prescribed medication for petitioner. In November 2004, petitioner was evaluated by Cecile Irvine, a psychologist from the New York City Police Department's Psychological Evaluation Section ("PES"). Ms. Irvine noted in her written report dated November 9, 2004, that petitioner had reported being depressed for two years, that he had had suicidal thoughts, and that he was

continuing to get psychotherapeutic and psychiatric treatment. She found that his condition was improving, but that he still had anxiety attacks and needed medication to maintain his ability to function, and she opined that he should not have firearms restored to him. She diagnosed him with Panic Disorder and Major Depressive Disorder and recommended that he be separated from the Police Department due to psychological disability.

The Medical Board considered the Police Commissioner's application on behalf of petitioner for ordinary disability retirement benefits on three occasions. In February 2005, the Medical Board reviewed the report of Ms. Irvine, heard a presentation from petitioner's psychologist, Dr. Gregory Coffey, and interviewed petitioner. The Medical Board's report noted that Dr. Coffey stated that petitioner was "functioning very well" but that he cannot perform full duty "[i]f full duty means carrying a gun." Following a remand to consider additional evidence, the Medical Board again met in June 2005 to consider petitioner's status. The Medical Board again interviewed petitioner and considered a letter sent by Dr. Frank Dowling, a psychiatrist treating petitioner. In his letter dated June 7, 2005, Dr. Dowling stated that petitioner was much improved, was continuing in psychotherapy, and was functioning much more effectively at work. He opined that petitioner could safely return to full duty police work without restrictions. The Medical Board, considering that petitioner's treating psychotherapist had four months earlier recommended that weapons not be returned to petitioner, and considering that petitioner was continuing to take medication and see a psychiatrist and psychotherapist, again recommended ordinary disability retirement. Following another remand to consider new evidence, the Medical Board met in December 2005 to consider the Police Commissioner's application. At this time, the Medical Board interviewed petitioner and reviewed a letter dated November 4, 2005, from Dr. Dowling and a report dated November 7, 2005, from Dr. Coffey. Dr. Dowling again stated

that petitioner was doing well and opined that petitioner could return to full duty police work. Dr. Coffey stated that petitioner has made remarkable progress and is capable of performing his full duties as a police officer, including carrying a firearm.

In its report dated December 12, 2005, the Medical Board noted that petitioner continues to see Dr. Dowling and Dr. Coffey and to take anti-depressant medications and “[w]hen seen today, he appeared somewhat drowsy, but was fully cooperative although his affect was constricted.” After considering the prior medical evidence and after its own evaluation of petitioner, the Medical Board concluded that:

Based on the material reviewed by the Article II Medical Board and the present examination, the Board reaffirms its previous decision and recommends approval of the Police Commissioner’s application for Ordinary Disability Retirement. The final diagnosis is Depressive Disorder.

On April 12, 2006, the Board of Trustees concurred with the Medical Board’s recommendation approving the application for ordinary disability retirement.

Petitioner contends that respondents’ decision to retire him on ordinary disability was arbitrary and capricious, unreasonable, and unlawful, in view of evidence that he was able to return to full duty work. Petitioner claims that respondents failed to consider evidence of his improvement and refused to have him re-evaluated by PES, relying instead on the November 2004 PES report. Petitioner argues that the reliance on the November 2004 report was arbitrary.

It is well settled that the Board of Trustees is bound by the Medical Board’s determination of disability. (See Matter of Borenstein v New York City Empls. Retirement Sys., 88 NY2d 756 [1996]; Matter of Canfora v Bd. of Trustees, 60 NY2d 347 [1983].) Moreover, “[o]rdinarily, a Medical Board’s disability determination will not be disturbed if the determination is based on substantial evidence [citations omitted]. 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' [citations omitted]." (Matter of Borenstein, 88 NY2d at 760.) Where the medical evidence is conflicting, it is solely within the province of the Medical Board to resolve the conflict. (Id.; Matter of DeNaro v New York City Empls. Retirement Sys., 265 AD2d 215 [1st Dept 1999], lv denied 95 NY2d 769 [2000].) The courts "cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board." (Matter of Santoro v Board of Trustees, 217 AD2d 660 [2d Dept 1995].)

Here, the Medical Board's determination that petitioner was disabled was based on "some credible evidence." The Board considered the medical reports of petitioner's treating doctors, as well as the PES psychologist, and made its own examination of petitioner. The Board also noted petitioner's need for ongoing treatment, including psychotherapy sessions and medication with a recent increase in dosage. Under these circumstances, the court cannot find that the Medical Board's decision was unsupported by some credible evidence. "Although petitioner's [psychiatrist and psychologist] drew the opposite conclusion, where, as here, the medical evidence is subject to conflicting interpretations, we must defer to the expertise of the Medical Board in resolving such conflict and to the judgment of the Board of Trustees in adopting the Medical Board's findings." (Matter of Mulheren v Board of Trustees of the Police Pension Fund, 307 AD2d 129, 131 [1st Dept 2003], lv denied 100 NY2d 515.)

Accordingly, the petition is dismissed in its entirety.

This constitutes the decision, order and judgment of the court.

Dated: New York, New York
June 1, 2007


MARCY FRIEDMAN, J.S.C.