

Hickey v Kelly

2007 NY Slip Op 32059(U)

June 29, 2007

Supreme Court, New York County

Docket Number: 0103902/2007

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PRESENT: _____ **J.S.C.**
Justice

PART 5

Hickey, Thomas
- v -
Kelly, Raymond

INDEX NO. 103902/07
MOTION DATE _____
MOTION SEQ. NO. 01
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

1
2, 3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED
JUL 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 29, 2007



EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

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

-----X

THOMAS HICKEY,

Petitioner,

Index No.
103902/07

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

- against -

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.

Decision
and Order

FILED
JUL 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X

HON. EILEEN A. RAKOWER:

Thomas Hickey (Petitioner) became a police officer with the New York City Police Department (City) in July, 1985, after successfully completing all exams and demonstrating that he was physically and mentally fit to perform a police officer's duties. In April, 2005, Petitioner, who is right hand dominant, sustained a line of duty injury when the rear seat of a vouchered car that he was searching fell on his left wrist. As a result, Petitioner underwent surgery in June, 2005. After his surgery Petitioner remained out of work and in August, 2005, he filed an application for Accident Disability Retirement(ADR) benefits based on the injury to his left wrist. In response to his application, the Police Commissioner filed an application for Ordinary Disability Retirement (ODR) benefits.

Petitioner was first examined by the Medical Board of the Police Pension Fund (Medical Board) in January, 2006, after he retired. The Medical Board's report states that "there were no significant objective findings precluding the detective from performing the full duties of a New York City Police Officer." It concludes, "[i]n light of that, the Article II Medical Board recommends disapproval of the detective's own application for Accident Disability Retirement and disapproval of the Police

Commissioner's application for Ordinary Disability Retirement."

In February, 2006, Petitioner was again examined by Dr. Lee Kupersmith, his orthopedic surgeon. Dr. Kupersmith concluded that Petitioner's left hand injury "significantly interferes with [Petitioner's] ability to be a police officer at this time and as such will always continue to interfere with him being a police officer. His injuries that he suffered are permanent in nature and will prevent him from returning to the police force in full duty."

Petitioner's ADR application was remanded back to the Medical Board in light of "new evidence to be submitted." The evidence submitted to the Board consisted of an MRI of Petitioner's wrist, reports from his physical and occupational therapists and reports from Dr. Kupersmith. Additionally, Petitioner provided reports from four other orthopedic surgeons, Dr. Keith Raskin, Dr. Baruch Toledano, Dr. Jay Nathan and Dr. Kenneth Montgomery. Dr. Raskin's May 5, 2006, report states that "occupational therapy is required to regain motion and strength after this complex injury and surgery." Dr. Tolendano's May 11, 2006, report concludes that petitioner "has a permanent condition which may interfere with his work as a policeman." Dr. Montgomery's June 5, 2006, report found weakness and loss of function and concludes that Petitioner would not benefit from physical therapy but encourages him to "try to do activities of daily living without restriction in hopes that this will help speed his recovery and minimize any residual symptoms he has in the region . . ." Dr. Nathan's August 22, 2006, report suggests that Petitioner should "use bracing material" and that "[a] cortisone injection could be given occasionally."

In July, 2006, Petitioner appeared again before the Medical Board. It reviewed the aforementioned reports from Petitioner's own doctors and again examined him. The Board's July 18, 2006, report concludes that "there were no significant objective findings precluding the detective from performing the full duties of a New York City Police Officer. In light of this, the Article II Medical Board reaffirms their previous decision and unanimously recommends disapproval for Accident Disability Retirement and disapproval of the Police Commissioner's application for Ordinary Disability Retirement."

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 [1st 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 [1st 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 [1st Dept. 1990]); *Matter of Quilty v. Ward*, 193 A.D.2d 439 [1st Dept. 1993]; *Matter of Vecchiarello v. Board of Trustees*, 115 Misc.2d 241 [Sup. Ct. N.Y. Cty. 1982]"

Here, Dr. Kupersmith, who performed Petitioner's surgery, believes that his injuries are permanent and that Petitioner could never return to full duty. Another orthopedist states that Petitioner's injury "may interfere" with his police duties. Three other orthopedists that Petitioner consulted offer no opinion as to how his injury

might affect his ability to perform his police duties. In sharp contrast to Dr. Kupersmith's opinion, the three doctors on the Police Department Medical Board find that not only is Petitioner not eligible for Accident Disability Retirement, but, in fact, he is not even eligible for Ordinary Disability Retirement. Instead, they state, that Petitioner is physically able to return to full duty.

While the determination of the Medical Board is 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*, 38 A.D.3d 363, [1st Dept. 2007]). Under the circumstances of this case, it cannot be said that the Board of Trustees' decision was arbitrary or capricious. Wherefore it is hereby

ORDERED that the petition seeking a declaration that 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: June 29, 2007



Eileen A. Rakower, J.S.C.

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