

Matter of White v Kelly
2007 NY Slip Op 32099(U)
July 5, 2007
Supreme Court, New York County
Docket Number: 0118122/2006
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH
Justice

PART 54

Gary White

INDEX NO. 118122/06

MOTION DATE 5/15/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Raymond Kelly et al

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	
1,3	
2,5	
4,1	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

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: 7/5/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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In the Matter of the Application of

GARY WHITE,

Petitioner,

Index No.:118122/2006

-against-

**DECISION and
ORDER**

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.

-----X

KORNREICH, SHIRLEY WERNER, J.:

Petitioner Gary White ("White"), a retired New York City police officer, brings this Article 78 proceeding and seeks a judgement to review and annul the actions of respondents Raymond Kelly, as Police Commissioner of the City of New York and Chairman of the Board of Trustees of the New York City Police Pension Fund, Article II (collectively, "Board of Trustees"), the New York City Police Department ("NYPD") and the City of New York, which denied him accident disability retirement ("ADR") benefits pursuant to section 13-252 of the Administrative Code of the City of New York ("Administrative Code"), and to declare said actions to be arbitrary, capricious, unreasonable and unlawful. Additionally, White requests that the Court: (1) Direct respondents to retire him with an ADR pension that is retroactive to the date of his service retirement, or in the alternative; (2) Direct a trial on the merits of the case, or in the alternative; (3) Direct the Board of Trustees to allow him and/or his representatives to present

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testimony at a hearing in order to prove his entitlement to ADR. Respondents seek the dismissal of White's proceeding because he failed to show that an "accident" not caused by his own negligence was the proximate cause of his injury. Therefore, they contend that their decision to deny him ADR benefits was reasonable, lawful and proper.

I. Factual Background

White continuously served NYPD's uniformed force from January 25, 1982 until his retirement in January 2003. Prior to his appointment with the NYPD, White passed the necessary physical and mental examinations that demonstrated he was physically and mentally fit to perform as a police officer. Additionally, he received "satisfactory" ratings during the length of his employment.

On June 28, 2002, White sustained a line of duty ("LOD") injury to his arms while assisting in the execution of a search warrant. White, who was forty-eight years old at the time, attempted to remove a large quantity of vouchered property from an above location and subsequently experienced sharp pain in his neck and elbow area. The hospital diagnosed him with ulnar nerve entrapment, and on December 22, 2002, he underwent ulnar decompression surgery.

On January 7, 2003, White submitted an application for ADR as a result of his LOD injury and ensuing disability. In response to his application, the Police Commissioner submitted an application for Ordinary Disability Retirement ("ODR"). On October 7, 2003, the Medical Board Police Pension Fund, Article II ("Medical Board") examined White and deferred making a final decision because "[he] is only 10 months from peripheral surgery and has improvement to a degree" and "[i]mprovement from this type of surgery can continue up to a period of two years."

The Medical Board examined White on September 7, 2004 and this time disapproved his application for ADR and the Police Commissioner's application for ODR. Thereafter, the Board of Trustees reviewed White's case and remanded it to the Medical Board due to the submission of new evidence.

Taking this new evidence into account, the Medical Board re-examined White and again disapproved his application for ADR and the Police Commissioner's application for ODR on April 12, 2005. Thereafter, the Board of Trustees reviewed White's case and remanded it to the Medical Board due to the submission of additional new evidence. On February 28, 2006, the Medical Board examined White for the fourth time. On this occasion, the Medical Board approved his application for ADR and disapproved the Police Commissioner's application for ODR, stating that "[t]he final diagnosis is Post Ulnar Nerve Injury Right Elbow with Residuals." The Medical Board opined that "[t]he competent causal factor is the line of duty injury of June 28, 2002."

On August 7, 2006, Jeffrey L. Goldberg, Esq., White's attorney, sent a letter to Gary DeRosa, Financial Secretary of the Sergeants' Benevolent Association, in which he outlined the details of White's LOD injury. Goldberg stated that "[White] clearly became disabled as a result of a line of duty accident which occurred while he was taking 'police action,'" and "as the injury and supporting documents specify, the injury occurred as a result of an unusually 'large quantity of vouchered property.'" Goldberg explained that this qualified "[t]he occurrence as 'unexpected and out of the ordinary,' under the accident versus incident designation standard created by the New York State Courts in matters of this type."

On August 9, 2006, the Board of Trustees reviewed White's case and disagreed with the

Medical Board. Consequently, they disapproved White's application for ADR and, instead, approved the Police Commissioner's application for ODR by a six-to-six tie vote. The Board of Trustees believed that White's LOD injury constituted an "incident" rather than an "accident."

II. Movant's Pleading

White avers that because the Board of Trustees forced him to retire with an ODR pension allowance, he received a retirement allowance substantially less than that to which he is entitled. He claims that an ADR pension would have comprised seventy-five percent of his final pay. Moreover, White contends that respondents' denial of his application for an ADR pension was arbitrary, capricious, unreasonable, unlawful, unconstitutional and contrary to the State of New York's statutes, law ordinances, rules and regulations applicable to these circumstances.

For example, White purports that the Board of Trustees' action: (1) failed, neglected and refused to use the proper legal test of entitlement to a LOD pension; (2) was contrary to competent evidence establishing that White sustained an ADR disability and was not based on any competent substantial evidence; and (3) failed to accord or provide White with a fair and reasonable opportunity, by way of notice and a hearing, to establish his entitlement to a LOD pension. Furthermore, White avows that the Board of Trustees' action is final, and that he has no other adequate remedy at law.

III. Respondents' Proof

According to respondents, the Medical Board is responsible for determining whether, medically, an applicant for disability retirement is disabled from performing full police duty. Respondents aver that if an applicant submits an ADR application, and if the Medical Board determines that the applicant is disabled, then the Medical Board also determines whether the

applicant's disability resulted from an on-duty incident or some other medical cause. The Medical Board, respondents claim, is not responsible for determining whether a disabling, on-duty injury is the result of an "accident." Instead, respondents contend that the Board of Trustees is solely responsible for determining whether an on-duty incident is or is not an "accident" for purposes of granting or denying ADR, and they affirm that the Board of Trustees' tie vote was reasonable in the instant case.

Furthermore, respondents assert that White did not meet his burden of showing that he was incapacitated by a LOD "accident" and, therefore, is entitled to ADR pursuant to section 13-252 of the Administrative Code. Respondents contend that to be entitled to ADR, a petitioner must prove he or she suffered physical or mental incapacitation "as a natural and proximate result of an accidental injury received in such city-service." In fact, respondents claim there is competent evidence to support the Board of Trustees' determination that White's disabling injury was not a LOD "accident," as defined by public pension statutes and relevant case law.

Therefore, respondents insist that denying ADR was not arbitrary, capricious or erroneous as a matter of law. They rather contend that their denial of White's application was lawful and proper and in accordance with the U.S. and New York Constitutions and with applicable statutes and case law. Finally, respondents aver that White failed to demonstrate the need for a trial or hearing, and they insist that the Court should not substitute its judgment on medical issues for that of the administrative body designated by statute to resolve such controversies. Respondents do not claim that their action is not final, or that White's proceeding is not ripe for review.

IV. Conclusions of Law

A court reviewing an Article 78 proceeding must judge the propriety of an administrative

action solely on the reasons cited by the administration. *See Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Such an action must be upheld unless it “shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law.” *See Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000). CPLR section 7803 states that the following questions may be raised in an Article 78 proceeding: (1) “Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed;” and (2) “Whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.”

Where, as here, the denial of ADR benefits is the result of a six-to-six tie vote of the Board of Trustees, its determination to grant ODR benefits can be set aside on judicial review *only* if the court concludes that the retiree is entitled to greater benefits as a matter of law. *Canfora v. Bd. of Trustees*, 60 N.Y.2d 347, 352 (1983). Unless it can be determined on the record that the retiree’s disability was the natural and proximate result of a service-related accident, the decision of the Board of Trustees to deny ADR benefits must stand. *Id.*, *see also Hallihan v. Ward*, 169 A.D.2d 542, 543 (1st Dept. 1991).

Section 13-252 of the Administrative Code provides that an applicant is entitled to ADR benefits if a medical examination reveals that his or her incapacitation was “a natural and proximate result of an accidental injury received in such city service, while a member, and that such disability was not the result of wilful negligence on the part of such member.” The term “accident” as used in the public pension statutes is defined as a “sudden, fortuitous mischance,

unexpected, out of the ordinary, and injurious in impact.” *Lichtenstein v. Bd. of Trs.*, 57 N.Y.2d 1010, 1012 (1982); *see also Kehoe v. City of New York*, 81 N.Y.2d 815, 817 (1993). However, an injury that occurs during one’s routine duties and is not caused by an unexpected, precipitating event is not an “accident.” *See Starnella v. Bratton*, 92 N.Y.2d 836, 838 (1998). Thus, ADR is not available for “injuries sustained while performing routine duties but not resulting from unexpected events.” *Kehoe*, 81 N.Y.2d at 817.

Here, the Board of Trustees’ tie-vote determination that there was no “accident” must be upheld because it is rationally based and is not arbitrary or capricious. *See Id.* Although the Medical Board opined that White’s injury resulted from his performance in the line of duty, it had no authority to determine whether such an injury was the result of an “accident” or an “incident.” Only the Board of Trustees had the power to decide whether White’s injury resulted from a LOD injury, and whether that LOD injury was an “accident.” *Canfora*, 60 N.Y.2d at 351 (“The function and duty of determining the ‘circumstances’ of the disqualification ... is conferred upon the [B]oard of [T]rustees.”).

Moreover, the Board of Trustees based its determination on credible medical evidence found in the record. *See Drayson v. Bd. of Trustees*, 37 A.D.2d 378, 381 (1st Dept. 1971) (explaining that an agency’s determination based on such relevance should not be disturbed). This evidence indicates that White attempted to remove a large quantity of vouchered property from an above location while executing a search warrant, whereby he experienced sharp pain in his neck and elbow area. However, there is no proof that a “sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact” occurred. *Kehoe*, 81 N.Y.2d at 817. Rather, the record suggests that White’s injury occurred during a routine task of employment,

absent of any unexpected, intervening event. An injury, such as White's, which is incurred while lifting, pushing or reaching does not qualify an applicant for ADR in the absence of an unexpected, intervening event that is not a risk of the job being performed. *See e.g., Dalton v. Kelly*, 16 A.D.3d 200, 201 (1st Dept. 2005) (catching a gunbelt on the patrol car door and twisting is not an accident because there was no sudden, unexpected event, and incident arose out of routine duties); *Gray v. Kerik*, 15 A.D.3d 275, 275 (1st Dept. 2005) (exiting from patrol car and feeling snap in knee is not an accident); *Smith v. New York City Employees' Retirement Sys.*, 215 A.D.2d 256, 256 (1st Dept. 1995) (explaining that it is not an accident where Parks Department worker lifted wheel barrow onto truck and lost his footing and fell). Thus, White's LOD injury was not "unexpected or out of the ordinary" under the "accident" versus "incident" standard as his attorney averred in his August 7, 2006 letter to the Sergeants' Benevolent Association.

In conclusion, the Board of Trustees based its decision on credible evidence and firmly-grounded precedent. Because White's June 28, 2002 incident occurred while he performed a routine task of employment and did not involve any sudden, intervening events, the Board of Trustees' denial of White's ADR benefits was neither arbitrary nor capricious. Additionally, there is no need for a trial regarding the issue of White's disability. CPLR section 7804 (h) states: "[i]f a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith." Since the instant case presents no triable issues of fact, White's request for a trial should be denied. Also, a trial is not necessary to determine whether there was credible medical evidence to support the Medical Board's decision. *See Mandracchia v. Cavanagh*, 36 Misc. 2d 936, 939 (Sup. Ct. NY County 1962) ("[W]here the issue involved is based solely on a conflict of medical testimony ... it is the function of the department head and not of the courts to resolve that question ... [i]t is only

where the appointing power acts illegally or capriciously that the court will interfere.”).

Accordingly, it is

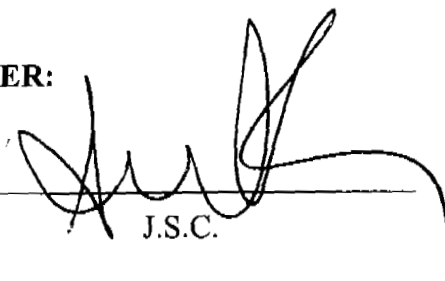
ORDERED that White’s request for an ADR pension retroactive to the date of his service retirement is denied; and it is further

ORDERED that White’s request for a trial on the merits of the case is denied; and it is further

ORDERED that White’s request that the Board of Trustees allow him to present testimony at a hearing in order to prove his entitlement to ADR is denied; and it is further

ORDERED, ADJUDGED and DECREED that White’s Article 78 proceeding is dismissed.

ENTER:



J.S.C.

July 5, 2007

UNFILED JUDGMENT
his 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)