

McCarthy v Police Pension Fund

2007 NY Slip Op 32129(U)

July 10, 2007

Supreme Court, New York County

Docket Number: 0109351/2005

Judge: Charles E. Ramos

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PRESENT: CC Ramos

PART 53

Index Number : 109351/2005

MCCARTHY, JOHN

vs

POLICE PENSION FUND

Sequence Number : 002

RESTORE ACTION TO CALENDAR

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

is decided in accordance with accompanying memorandum decision and order.

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)

Dated: 7/10/07

[Signature]

HON. CHARLES E. RAMOS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST 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:COMMERCIAL DIVISION

-----X
In the Matter of the Application of
JOHN MCCARTHY,

Petitioner, Index No.:109351/05

For a Judgment Pursuant to Article 78 of the
CPLR

- against-

BOARD OF TRUSTEES OF THE NEW YORK CITY
POLICE PENSION FUND, ARTICLE II MEDICAL
BOARD, POLICE PENSION FUND ARTICLE II,

Respondents.
-----X

Charles Edward Ramos, J.S.C.:

Petitioner John McCarthy, a police officer for 34 years,
moves to restore this action to the calendar and upon
restoration, petitioner challenges respondent's denial of
petitioner's application for an accidental disability pension
("ADP") under the Heart Bill. Municipal Law § 207-k, provides:
Disabilities of Policemen and Firemen in Certain Cities

a. Notwithstanding the provisions of any general,
special or local law or administrative code to the
contrary, but except for the purposes of sections two
hundred seven-a and two hundred seven-c of this
article, the workers' compensation law and the labor
law, any condition of impairment of health caused by
diseases of the heart, or by a stroke, resulting in
total or partial disability or death to a paid member
of the uniformed force of a paid police department or
fire department, where such paid policemen or firemen
are drawn from competitive civil service lists, who
successfully passed a physical examination on entry
into the service of such respective department, which
examination failed to reveal any evidence of such
condition, shall be presumptive evidence that it was
incurred in the performance and discharge of duty,
unless the contrary be proved by competent evidence.

McCarthy argues that respondents, the Board of Trustees of the

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New York City Police Pension Fund, Article II (the "Trust Fund") and Medical Board Police Pension Fund Article II (the "Medical Board"), failed to rebut the presumption under the Heart Bill that petitioner's atrial fibrillation and hypertension were incurred in the performance of police duties.

Petitioner filed his first Article 78 proceeding on May 14, 2001. On March 20, 2002, this Court rendered a decision finding that petitioner was entitled to ADP as a matter of law. Respondents moved for re-argument arguing that petitioner's ventricular hypertrophy, atrial fibrillation and hypertension, for which he has been treated with the drug Cardizem since 1997, were mild, moderate or minimal. On November 25, 2002, the Court granted re-argument and adhered to its decision explaining that the statute does not speak to severity of the condition, thus it does not rebut the statute's presumption. Respondent filed an appeal. The Appellate Division affirmed on June 19, 2003 and remanded the matter to respondents for further consideration.

On August 4, 2003, petitioner requested that respondent calendar petitioner's application for ADP. In a December 22, 2003 memo to the Medical Board, the Trustees which requested: (1) an examination of the difference between "uncontrolled hypertension" and hypertension controlled by medication; (2) a determination as to whether qualifying words such as "minimal," "mild" or "moderate" to describe petitioner's concentric hypertrophy is significant enough to rebut the Heart Bill's presumption; and (3) a response as to whether the Appellate

Division's view that because petitioner has a constellation of symptoms, the presumption has not been rebutted. Petitioner contends that this memo did not comply with the courts' orders. The Court agrees.

On March 5, 2004, petitioner appeared for an examination by the Medical Board and in its report the Medical Board stated that petitioner's diagnosis of hypertension was of a mild degree only and that it was regulated while taking a minimum of medication. It deferred determination on the application until petitioner obtained his blood pressure readings from 1999.

On April 12, 2005, petitioner submitted to the Medical Board letters dated March 3 and March 9, 2004 from Dr. William Blau providing a diagnosis of hypertension, atrial fibrillation and left ventricular hypertrophy, a medication history and blood pressure readings. He also submitted a March 10, 2004 letter from Dr. Daniel Mausner stating that petitioner was treated for hypertension on February 2, 1996.

The Medical Board refused to calendar petitioner's application without the 1999 echocardiogram. In 2004, Dr. Blau no longer had the 1999 echocardiogram in his office, but a copy was finally submitted in October 2004.

The Medical Board issued a report dated October 15, 2004. On November 18, 2004, petitioner submitted the Medical Board's report to Dr. Blau and asked for a response. Dr. Blau's report dated January 7, 2005 stated that (1) petitioner was diagnosed with hypertensive heart disease with evidence of left ventricular

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hypertrophy and elevated diastolic blood pressure and was immediately started on Cardizem; (2) petitioner's blood pressure was improved by the Cardizem; (3) Vioxx, which petitioner took after taking Cardizem for several years, should not cause left ventricular hypertrophy; (4) petitioner has obstructive airway disease which limits the study of the 1999 echocardiogram, but a 1994 echocardiogram also shows left ventricular hypertrophy. Finally, on March 9, 2005, the Trustees considered petitioner's application for ADP and voted six to six to award petitioner ordinary disability, not ADP.¹

On July 6, 2005, petitioner commenced a second article 78 proceeding. The Assistant Corporation Counsel admitted that the Medical Board had failed to consider Dr. Blau's January 7, 2005 report and the Trustees had failed to afford petitioner an administrative remand for consideration of Dr. Blau's report. The second action was withdrawn from the calendar without prejudice so petitioner's application could be calendared for the Trustees October 12, 2005 meeting. The Medical Board issued a report dated December 5, 2005. Dr. Blau responded to the report on April 7, 2006 stating that there was contemporaneous evidence of hypertension and ventricular hypertrophy; that he made a diagnosis of hypertensive heart disease in 1995 prior to

¹It is procedural practice that when the Trustees reach a tie vote on the issue of whether a member's disability is causally related to a service-related accident, the member is denied ADR and awarded ODR benefits. See *Matter of Meyer*, 90 NY2d 139 144-5 (1997); *Matter of Hallihan v Ward*, 169 AD2d 542 (1st Dept 1991).

petitioner's application for ADP; and challenges the Board's statement that 1.4 cm is the threshold for septal wall thickness when Brunwald's, Heart Disease: A Textbook of Cardiovascular Medicine, 7th ed, set the standard range at .6 to 1.1 cm.

Under the New York City Administrative Code, a police officer certified by the Medical Board as physically or mentally incapacitated for the performance of police duties is retired by the Trustees on ordinary disability retirement pursuant to §13-251 or if incapacity was "a natural and proximate result of an accidental injury received in" the performance of the police officer's duties, then on Accidental Disability Retirement pursuant to §13-252.² The applicant for ADP has the burden of

² It provides:

Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or her or on his or her behalf in connection therewith shall be made upon the application of the commissioner, or upon the application of a member or of a person acting in his or her behalf, stating that such member is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of wilful negligence on the part of such member and that such member should, therefore, be retired. If such medical examination and investigation shows that such member is physically or mentally incapacitated for the performance of city-service as 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 and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability,

establishing that he is disabled and that his disability was the result of an accidental injury received in City service. *Archul v Board of Trustees*, 93 AD2d 716, 717 (1st Dept), aff'd, 60 NY 2d 567 (1983).

The Heart Bill "creates a presumption that a disabling or fatal heart condition suffered by a New York City police officer or fireman was accidentally sustained as a result of his employment if not rebutted by contrary proof." *Uniformed Firefighters Assn. v Beekman*, 52 NY2d 463, 472 (1981). The presumption may be overcome by competent evidence to the contrary. *Knorr v Kelly*, 35 AD3d 326 (1st Dept 2006). There are two categories where the Heart Bill presumption has been rebutted. The first is inapplicable here as there is no claim that the heart disease is congenital, viral or the result of a childhood disease. See, *Simmons v Herkommer*, 62 NY2d 711 (1984) (Medical Board found "valvular heart disease with aortic insufficiency" was caused by childhood disease); *Ferrigno v Board of Trustees*, 48 NY2d 788 (1979) (Medical Board found cardiac problem resulted from Hodgkins disease, not stress). In the second category of cases, the Medical Board has concluded that certain heart diseases were of unknown etiology, but that in the absence of coronary heart disease or hypertension, the heart disease is not "stress-related" or "job-related." *Stegmuller v Brown*, 216 AD2d 23 (1st Dept 1995), appeal denied, 87 NY2d 807

and such board shall retire such member for accident disability forthwith.

(1996); *Goldman v McGuire*, 101 AD2d 768 (1st Dept 1984), aff'd, 64 NY2d 1041 (1985).

Respondents assert that petitioner's claim was properly rejected because he failed to demonstrate hypertensive heart disease manifested by hypertrophy and abnormal functioning of the left ventricle of the heart or coronary artery disease. Atrial fibrillation may be considered stress related when it appears in conjunction with underlying heart disease which may be stress related, but that petitioner evidenced no objective manifestations of underlying heart disease since neither the EKG, his stress test, nor the Board's own examination revealed any indication of prior myocardial infarction (heart attack) or of myocardial ischemia (an inadequate flow of blood and oxygen to the heart muscle) or evidence of coronary heart disease. In *Matter of Goldman*, 101 AD2d 768, aff'd, 64 NY2d 1041, the court held that "competent evidence which demonstrates that a heart condition which, in the absence of hypertension or coronary disease, is not stress related or induced by occupational factors is sufficient to rebut the statutory presumption and that the Medical Board is not required to identify the cause of the condition."

Respondents maintain that the Medical Board's determination rebuts the Heart Bill presumption because petitioner's atrial fibrillation has no stress related pathology such as "significant" hypertension, hypertensive heart disease, left ventricular hypertrophy or ischemic damage to the heart. The

Medical Board had before it 24 of petitioner's blood pressure readings taken by Dr. Blau from December 1994 to March 2004. The highest reading was 140/92 which appeared twice over ten years while there were low pressure readings of 120/78 on March 9, 1999 and 110/80 on October 17, 2001.

Dr. Karp, a pulmonologist who examined petitioner twice in 1998, recorded blood pressure readings of normal and another of 140/90. Dr. Karp noted that petitioner is a heavy smoker, namely two packs a day for 40 years, a family history of atrial fibrillation, as well as bronchitis, while also displaying "moderate chronic obstructive pulmonary disease with bronchospasm." Dr. Karp diagnosed petitioner's shortness of breath as "probably multi-factorial" with "evidence of ... atrial fibrillation, as well as chronic obstructive pulmonary disease and extensive weight gain" being the causative factors.

The Trustees questioned the Medical Board whether there was credible evidence of hypertension. The Medical Board responded that petitioner had not submitted definite evidence of hypertension. The Medical Board also disagreed with Dr. Blau's conclusion that there was evidence of left ventricular hypertrophy since petitioner's posterior and septal heart walls measured 1.3 centimeters in thickness where the range is .6 to 1.1 centimeters. First, the Medical Board, concluded that 1.3 centimeters in thickness was within the upper range of normal limits. The Medical Board also concluded that the June 1999 echocardiogram study was of such poor quality, "technically

limited" that its septal and posterior ventricular heart wall thickness measurements could not be relied upon. Finally, the Medical Board examined petitioner on March 5, 2004 and found no evidence of stress-related pathology of the heart or circulatory system. Respondents maintain that where, as here, there is a difference of medical opinion the Medical Board is entitled to deference. *Mulheren v Bd. of Trustees of the Police Pension Fund*, 307 AD2d 129, 131 (1st Dept), lv. denied, 100 NY2d 515. Likewise, a difference in medical opinion does not provide an occasion for judicial interference. *Matter of Muffoletto*, 198 AD2d at 7.

On March 20, 2002, this Court held that petitioner provided undisputed evidence of atrial fibrillation and hypertension. "Such evidence was repeatedly placed before, and ignored by, the Medical Board." *McCarthy v Bd. of Trustees*, NY Supreme Court, Index No. 109944/01 at 4 (March 2, 2002). On reargument, the court rejected respondents' argument that "minimal," "mild," or "not excessive" symptoms rebut the presumption. *McCarthy v Bd. of Trustees*, NY Supreme Court, Index No. 109944/01 at 4 (Nov 25, 2002).

According to the Appellate Division, First Department, this court "correctly held that the undisputed evidence of stress-related heart disease accompanying petitioner's admittedly disabling atrial fibrillation, including hypertension, left ventricular hypertrophy and dyspnea, raised a presumption that the disability was job-related which respondents failed to

rebut." *McCarthy v Board of Trustees of the New York City Police Pension Fund*, 306 AD2d 156 (1st Dept 2003).

The Appellate Division remanded the matter to respondents for reconsideration of the application based on *Matter of Duester v McGuire*, 81 AD2d 553 (1st Dept 1981) wherein the Supreme Court had directed an accident disability pension be granted because the denial was arbitrary and capricious. In that case, the Medical Board made no findings of fact concerning the heart condition or prolapse of the mitral valve.

Apparently, the Medical Board has yet again, for the fourth time, ignored petitioner's evidence of hypertension. This Court's finding that the Medical Board had ignored the evidence and the Appellate Division's affirmance of that decision with instruction to reconsider the application were not an invitation to ignore the evidence again. The facts before the Medical Board at the time of its arbitrary and capricious decision were the same facts before it on reconsideration. Demonstrating its confusion over its responsibility was the Trust's December 2005 memo to the Medical Board requesting: (1) an examination of the difference between "uncontrolled hypertension" and hypertension controlled by medication; (2) a determination as to whether qualifying words such as "minimal," "mild" or "moderate" to describe petitioner's concentric hypertrophy is significant enough to rebut the Heart Bill's presumption; and (3) whether the Appellate Division's view that because petitioner has a constellation of symptoms, the presumption has not been rebutted.

The memo demonstrates the Trust's intent to usurp the Court's role. All three questions attack the Courts' conclusion that petitioner has satisfied the statute and is entitled to the presumption. As to question 1, the statute does not exempt police officers who have satisfied the presumption, as both this court and the Appellate Division have held, but who are successfully treated with medication. As to question 2, this Court specifically rejected respondent's argument that the Medical Board's conclusion that McCarthy's condition is "minimal," "mild" or "not excessive" and that this conclusion rebuts the presumption. See *In re McCarthy v Board of Trustees of the NYC Police Pension Fund, Article II et al*, Nov. 25, 2002. By remanding the matter, the Appellate Division did not authorize respondents to overrule both this Court and the Appellate Division which affirmed our decision. Rather, the only question before Respondent was whether there was competent evidence to overcome the presumption. The Medical Board's question 3 is most astounding; the Medical Board attacks the Appellate Division itself which held that respondents had not rebutted the presumption. Respondents lack the authority to review and reverse the Appellate Division. See Const. Art. VI, §2. Respondents have failed to rebut the presumption and thus the denial of petitioner's application for an ADP is yet again arbitrary and capricious.


Now the problem is petitioner's remedy. Where the facts are undisputed as they are here and respondent has done nothing to

rebut the presumption, this court has the authority to direct respondent to award an ADP consistent with this decision. *Jones v Board of Trustees*, 123 AD2d 628 (2d Dept 1986), appeal denied, 69 NY2d 608 (1987). Plaintiff filed his original petition on May 14, 2001. He has waited long enough. It would be unfair and "Kafkaesque" to remand the case to respondents for further consideration subjecting petitioner to another delay of six years. Accordingly, respondents are directed to grant to petitioner an ADP consistent with this decision and that of the Appellate Division and to calculate the benefits.

Accordingly, it is

ADJUDGED, that the petition is granted and the action is restored to the calendar and upon restoration, respondents denial of petitioner's application for ADP is vacated and the action is remanded to respondents to grant ADP consistent with the decisions of this Court and the Appellate Division and to calculate the pension.

Dated: July 10, 2007



HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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 representatives must
 appear in person at the Judgment Clerk's Desk. (R0001-
 17B)