

Matter of Vine v Kelly
2007 NY Slip Op 32220(U)
July 11, 2007
Supreme Court, New York County
Docket Number: 0111204/2006
Judge: Leland G. DeGrasse
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LELAND DeGRASSE

Justice

PART 25

MORREY VINE

Raymond Kelly

111204/06

INDEX NO. _____

JUN 06 2007

MOTION DATE _____

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

UNFILED JUDGMENT

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

DECISION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

JUL 11 2007

40

Dated: _____

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 : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

-----X

In the Matter of the Application of :
MORREY VINE, :

Petitioner, :

Index No.: 111204/06

Cal. No.: 85 of 1/9/2007

For a Judgment Pursuant to 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, THE :
BOARD OF TRUSTEES of the Police Pension Fund, :
Article II, NEW YORK CITY POLICE DEPARTMENT :
and THE CITY OF NEW YORK, :

Respondents. :

UNFILED JUDGMENT

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-----X
DeGRASSE, J.:

In this Article 78 proceeding, petitioner Morrey Vine seeks a judgment: (1) annulling the action of respondents in denying his application for accident disability retirement benefits pursuant to the Administrative Code of the City of New York ("Administrative Code") § 13-252, (2) declaring such denial to be arbitrary, capricious, unreasonable, and unlawful, and (3) directing respondents to retire him with an accident disability retirement allowance retroactive to the date of his retirement. Alternatively, petitioner seeks an order directing a hearing on the factual issues raised herein, or an order directing that the Board of Trustees of the Police Pension Fund Article II ("the Board of Trustees") allow him and/or his representatives to present such testimony as is necessary at a hearing held before it in order to prove his entitlement to an accident disability retirement allowance.

Petitioner also seeks an order directing respondents to serve and file all documents, medical records and reports submitted to them, or on file, regarding his retirement, as well as copies of minutes of all relevant meetings pursuant to CPLR 2307 (a).

BACKGROUND

Petitioner was appointed to the New York City Police Department on January 26, 1982, and served continuously until his retirement for service in August 2002. The record discloses that during the course of his tenure, petitioner sustained several injuries to his back as the result of accidents occurring in the line-of-duty: on July 12, 1984, he strained his back while transporting video games up the front steps of the station house on a hand truck; on November 4, 1984, petitioner experienced a sharp pain on the right side of his back after administering CPR to an unconscious woman; on September 12, 1989, he injured his right knee and lower back while in foot pursuit of a robbery suspect. Petitioner maintains that the above-mentioned injuries were well documented and form the basis for his chronic back pain which has permanently disabled him.

On June 10, 2002, petitioner applied for accidental disability retirement ("ADR") based on three line-of-duty injuries. Thereafter, the Police Commissioner submitted an application for ordinary disability benefits ("ODR") on petitioner's behalf.

By letter dated August 15, 2002 petitioner's treating physician, Dr. Barry G. Fisher, Director of Sports Medicine, Long Island Jewish Medical Center, informed the Medical Board that an MRI of petitioner's lower back, taken on July 10, 2002, showed evidence of disc herniation at the left L3-L4 level with impingement of the left L3 nerve root, and disc bulging at the L4-L5 and L5-S1 levels. Additionally, electrical diagnostic studies of petitioner's lower extremities, performed on August 9,

2001, revealed the presence of: (1) bilateral L4-L5 radiculopathies, which were more severe on the right, (2) right L-5 and left L5-S1 nerve root pathology, (3) distal muscle pathology/weakness in the left gastrocnemius and right tibialis anterior, and (4) nerve hyperirritability bilateral at the L4-L5 and L5-S1 levels. Dr. Fisher diagnosed petitioner as suffering from "chronic back pain since the accident of September 12, 1989," and opined that "he is permanently disabled from performing his physical duties as a Police Lieutenant."

On October 30, 2002, the Medical Board Police Pension Fund, Article II ("the Medical Board") unanimously recommended to the Board of Trustees that petitioner be denied ADR and ODR benefits. After examining petitioner and reviewing all of his medical records, the Medical Board concluded that the documentary and clinical evidence did not substantiate that petitioner was disabled from performing the full duties of a New York City police officer.

On March 5, 2003, Dr. Fisher wrote a letter to the Medical Board reaffirming his findings of August 15, 2002, that petitioner was "totally disabled" and his disability precluded him from performing police work.

On March 12, 2003, the Board of Trustees remanded petitioner's case to the Medical Board for re-evaluation in light of the discrepancy in two medical opinions. In doing so, the Board of Trustees noted their concern that the Medical Board's report indicated that a review of petitioner's July 10, 2002 MRI showed no evidence of definitive nerve root impingement, whereas a report from Dr. Adam Silvers of Next Generation Radiology, indicated that there was a disc herniation at L3-L4 level with impingement on the existing left L3 nerve root.

In a letter dated April 14, 2003, addressed "To Whom It May Concern," Dr. Francis J. Lanzone, M.D., Instructor of Clinical Orthopaedics School of Medicine S.U.N.Y. Stony Brook, stated that "[petitioner's] physical examination was significant for an absent knee jerk on the left side, positive straight leg raising findings on the left side and numbness in the right leg in the L3-4 nerve root distribution. He otherwise, had all the signs and symptoms of a herniated disc and low back syndrome." Dr. Lanzone opined that "[petitioner] is unable to work for gainful employment at this time due to his severe pain and neurologic findings."

On June 11, 2003, the Medical Board re-examined petitioner and held off making a final decision pending a second opinion of petitioner's 2002 MRI.

At a third reconsideration by the Medical Board on January 12, 2005, the Board reviewed the letters of Drs. Fisher and Lanzone, dated March 5, 2003 and April 14, 2003, respectively, which supported petitioner's application for ADR benefits. However, the Board reaffirmed its previous recommendation that petitioner be denied disability benefits, noting that "[p]revious electrodiagnostic studies showed evidence of bilateral L4-L5 radiculopathies, which do not correlate with the MRI findings."

On April 13, 2005, the Board of Trustees remanded petitioner's case to the Medical Board for reevaluation in light of new evidence. On January 25, 2006, the Medical Board considered petitioner's application for a fourth time. After examining petitioner and reviewing the submissions, the Medical Board reaffirmed its previous recommendation that petitioner be denied ADR and ODR benefits. In paragraph nine of its report the Board concluded the following:

“The Medical Board finds that Lieutenant Vine has no evidence of a disability on physical examination, which would preclude him from performing the full duties of a New York City Police Officer at this time, in spite of the fact that he has been retired for three years. After review of the entire record, the Article II Medical Board fails to find information and documentation that indicates that Lieutenant Vine was disabled at the time of his original application and retirement from performing the full duties of a New York City Police Officer. The Medical Board notes that findings such as impingement do not confer disability and given his complaints consistent with L4-5 nerve root impingement, the subjective findings do not clinically correlate to the MR[*I*] findings of a left L3 nerve root impingement. The Medical Board has failed to find objective findings of a persistent radiculopathy. Therefore, the Article II Medical Board reaffirms its previous decision and recommends disapproval of the lieutenant’s own application for Accident Disability Retirement and disapproval of the Police Commissioner’s application for Ordinary Disability Retirement.”

By letter dated April 12, 2006, petitioner was notified that the Board of Trustees, acting upon the recommendation of the Medical Board, had denied his applications for disability retirement. Petitioner subsequently commenced the instant Article 78 proceeding seeking to be retired on an ADR pension.

DISCUSSION

Petitioner asserts that denial of his application for ADR benefits was arbitrary and capricious, as well as violative of state and federal statutes and constitutions. Specifically, petitioner argues that “the Medical Board’s failure to explain or justify its denial, or refute in detail the assertions of petitioner’s treating doctors, which detail why petitioner could not safely perform full duty, renders the denial insufficient as a matter of law.” Petitioner further argues that his retirement allowance is substantially less than he is entitled to because he was denied a pension based upon ADR benefits.

By verified answer, respondents argue that the finding that petitioner was not disabled from performing the full duties of a New York City police officer, "either at the time of his original ADR application, or at the time of his retirement," is supported by credible medical evidence in the record and is neither arbitrary nor capricious. Respondents further argue that "[w]hile some of petitioner's doctors interpreted his MRI test results differently from the Medical Board and other doctors, and also regarded him as disabled, a difference in medical opinion does not make a determination arbitrary and capricious."

In his reply, petitioner asserts, *inter alia*, that although the Medical Board found that petitioner's MRIs and complaints do not support an L3-L4 disc herniation with nerve root impingement, "5 other specialist[s] all reached that exact diagnosis."

ADR benefits are provided to members of the Police Pension Fund who become "physically or mentally incapacitated from the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member" (Administrative Code § 13-252). The applicant for ADR benefits has the burden of demonstrating entitlement to the relief sought (*see Matter of Tripi v Ward*, 158 AD2d 336 [1990]; *Matter of Nicolosi v Board of Trustees*, 198 AD2d 282 [1991]). A determination of the Board of Trustees denying a petitioner ADR benefits may be set aside upon judicial review "only if it can be determined as a matter of law on the record that the disability was a natural and proximate result of a service-related accident" (*Matter of Kmiotek v Board of Trustees*, 232 AD2d 640 [1996]; *see also Matter of Canfora*, 60 NY2d 347 [1983]; *Matter of Flynn v Board of Trustees*, 201 AD2d 730 [1994]).

The question of whether the petitioner has the injuries claimed and whether the injuries incapacitate the petitioner from the performance of duty is solely for the Medical Board *see Quill v Ward*, 138 AD2d 305 [1988]). Its determination on these issues is binding on the Board of Trustees (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756 [1996]; *see also Matter of DeMarco v New York City Employees' Retirement Sys.*, 211 AD2d 594 [1995]). In an Article 78 proceeding challenging a disability determination, the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary or capricious (*see Borenstein*, 88 NY2d at 761). "The courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board if the Medical Board's determination is supported by any credible evidence and is not irrational" (*Matter of Ruzicka v Bd. of Trustees of New York City Fire Dept., Art. 1-B Pension Fund*, 283 AD2d 581, 581 [2001]; *Matter of Schwarzrock v Bd. of Trustees of the New York City Fire Dept., Art. 1-B Pension Fund*, 238 AD2d 596, 597 [1997], *lv denied*, 91 NY2d 803 [1993]). A Medical Board's opinion meets the standard of "credible evidence" when it clearly articulates a "detailed and fact-based" medical explanation explaining the basis for its conclusion (*Matter of Meyer v Board of Trustees*, 90 NY2d 139, 152 [1997]).

In the instant case, petitioner has not met his burden of demonstrating that respondents acted arbitrarily or capriciously or contrary to law. Instead, the papers before the court show that respondents acted reasonably and had a rational basis for relying on the Medical Board's determinations which found, based on credible medical evidence, that petitioner was not disabled from performing the full duties of a police officer. The Medical Board reviewed petitioner's entire records, including physician reports submitted by petitioner, complaints, and diagnostic tests (X-ray, CT scan, bone scan, MRIs, and EMG studies). Petitioner also conducted its own clinical evaluation

of petitioner.

The October 30, 2002 report by the Medical Board noted the following:

1. A CT scan of petitioner's lumbar spine, conducted by Dr. Richard Silvergleid of Manhasset Diagnostic Imaging, P.C. on November 24, 1990, included the doctor's impression that there was evidence of mild central posterior bulging at L3-4, L4-5 and L5-S1, which was slightly more prominent in the region of the right recess at L3-4. No herniated disc fragment or significant neural compression was seen at any level.
2. A bone scan conducted by Dr. Silvergleid on January 18, 1991, indicating that the test results were normal.
3. An MRI of petitioner's lumbar spine, taken on February 21, 1991, included an impression by Dr. Silvergleid that there was evidence of minimal posterior bulging disc annuli at L3-4, L4-5 and L5-S1 with slightly asymmetric right foraminal bulging at L3-4, causing effacement of the exiting right L3 root.
4. An MRI of petitioner's lumbar spine, taken on October 30, 1991, included the impression by Dr. Silvergleid that there was no change from the prior study of February 21, 1991.
5. A report from Dr. Alan Rosenthal of Long Island Neurosurgical Associates, P.C., dated December 11, 1991, indicating that petitioner's MRI showed no major surgical lesion.
6. A report from Dr. David Lowell, a neurologist, dated January 8, 1992, indicating that petitioner was suffering from "lumbar strain," and that his neurological examination was normal.
7. An MRI of petitioner's lumbar spine, taken on October 21, 1996, included the impression by Dr. Harold Augenstein, a radiologist, that there was evidence of a small far left lateral disc bulge at L3-4, and a small posterior disc bulge at L4-5.
8. An MRI of petitioner's lumbar spine, taken on May 4, 2001, included the impression by Dr. Mark E. Pugach of Next Generation Radiology, that there was evidence of mild discogenic and spondylotic disease, most pronounced at L4-5 and L3-L4, without definite nerve root impingement. No large disc protrusions were demonstrated.

9. A report from Dr. Axelrod, an orthopedic surgeon, dated September 25, 2001, recommending that petitioner return to full duty.
10. An MRI of petitioner's lumbar spine, taken on July 10, 2002, included the impression by Dr. Silvers that there was evidence of a small left foraminal disc herniation at the L3-4 level with impingement on the exiting left L3 nerve root. However, the Board noted that its review of the July 10, 2002 MRI found no evidence of definitive nerve root impingement.
11. A physical examination of petitioner on October 30, 2002, indicating that petitioner "ambulates with a non-antalgic, stiff-legged gait," and was able to "toe walk." Additionally, petitioner's shoulders, pelvis and gluteal folds were level, and the normal lordotic curvature of his spine was maintained.

The June 11, 2003 report by the Medical Board noted that at the Board of Trustees' request, it reviewed petitioner's July 10, 2002 MRI, and its reading of said MRI did not concur with the reading of Dr. Silvers. In paragraph seven of its report, the Board also noted that a physical examination of petitioner showed the following:

"... the officer walks with a non-antalgic gait. He dresses and undresses unaided. He mounts the examination table without aid. He has difficulty walking on his right heel and toe. He does a half of a squat. His right knee jerk is depressed when compared to the left. There is no sensory deficit. Manual motor testing is 5/5 in both lower extremities. Circumferential measurements at a maximum circumference, show a 3/8 of an inch difference with the right leg being slightly larger than the left in this right-hand dominant man. On forward flexion, he bends to 60 degrees, extends to 15 degrees, rotates to 30 degrees bilaterally and tilts to 20 degrees. He has some right sacroiliac and right sciatic notch pain. In the seated position, straight leg raising on the right is to 45 degrees, and on the left is to 60 degrees. In the supine position, straight leg raising on the left is to 60 degrees, and on the right is to 45 degrees."

The January 12, 2005 report by the Medical Board noted that although a March 5, 2003 report by Dr. Fisher diagnosed petitioner as having diminished strength in both legs, this finding was not substantiated by the Board's report and physical examination performed on June 11, 2003.

Lastly, the January 25, 2006 report by the Medical Board summarized petitioner's current complaints which included "back pain radiating through the buttock to the anterior aspect of the thigh and to the medial and lateral aspect of his anterior, medial and lateral aspect of the calf, around the mid-shin," which is "precipitated by bending, lifting, and sitting for long periods of time." However, in paragraph eight of its report, the Board noted that a physical examination of petitioner revealed the following:

"... the [petitioner] walks with a normal gait with the ability to heel and toe walk with giving way. Grading of muscle groups, the best 3/5 in dorsi flexion and plantar flexion. Quadriceps were similar with 3+/5, hamstrings were 3+/5 and hip abductors and adductors were 4/5. There is no sensory loss. Despite previous findings of loss of Achilles reflex by his other physicians, the Medical Board failed to find this, noting the reflexes were 2+ and symmetric at the patella and Achilles. There was no calf atrophy with the calves being symmetric bilaterally."

Accordingly, the Medical Board's finding, that petitioner was not disabled, was based on the numerous detailed reports of its examination of petitioner, in addition to numerous reports submitted by petitioner. The different conclusions reached by petitioner's physicians (Drs. Fisher and Lanzone) provide no basis for annulling respondents' determination. Significantly, while petitioner's own physicians reached the conclusion that he has serious disabling injuries, their reports, including their reading of objective tests such as MRIs, reflect an exercise of medical judgment, and do not conclusively establish petitioner's condition (*see Borenstein*, 88 NY2d at 761). Where medical evidence is subject to conflicting interpretations, it is solely within the province of the Medical Board to resolve the conflict (*id.* at 760; *Matter of DeNaro v New York City Employees' Retirement Sys.*, 265 AD2d 215 [1991], *lv denied* 95 NY2d 769 [2000]).

Inasmuch as the Medical Board fully considered petitioner's medical evidence, undertook an independent review of petitioner's test results, and performed and set forth the results of its own physical examinations of petitioner, its determination cannot be judicially disturbed because it was supported by "some credible evidence," and was not arbitrary and capricious (*see Matter of Wahl v Board of Trustee of New York City Fire Dept.*, 89 NY2d 1065, 1067 [1997]; *Matter of Mininni v New York City Employees' Retirement Sys.*, 279 AD2d 428 [2001], *lv denied*, 96 NY2d 722 [2001]).

The court has reviewed petitioner's remaining contentions and find them to be without merit.

CONCLUSION

For the foregoing reasons petitioner's application is denied and the instant petition is dismissed.

This constitutes the decision and judgment of the court.

DATED:

JUL 11 2007

J.S.C.

HON. LELAND DeGRASSE

UNFILED JUDGMENT
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