

Matter of Simpson v Kelly
2007 NY Slip Op 32223(U)
July 11, 2007
Supreme Court, New York County
Docket Number: 0112360/2006
Judge: Leland G. DeGrasse
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. LELAND DEGRASSE

PART 25

Index Number : 112360/2006

SIMPSON, ERNESTO

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO.

112360/06

MOTION DATE

2/9/07

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

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 141B).

JUL 11 2007

Dated: _____

J.S.C.

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

----- X
In the Matter of the Application of :
ERNESTO SIMPSON, :

Petitioner, :

Index No.: 112360/06

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

Cal. No.: 116 of 2/9/07

- 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. :

----- X
DeGRASSE, J.:

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 141B).

In this Article 78 proceeding, petitioner Ernesto Simpson 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 (the "NYPD") in July 1985 and served continually until his retirement in 2005. The record discloses that during the course of his tenure, petitioner sustained off-duty injuries to his lower back in December 1989, November 1994, and December 2002. Thereafter, on August 1, 2003, petitioner sustained a line-of-duty injury while attempting to effect an arrest. Petitioner was taken to New York Methodist Hospital where he was diagnosed with back sprain and muscle sprain of the left thigh. Petitioner was given pain medication and was discharged. On that same day, petitioner filed a line-of-duty injury report stating that he fell and injured his back and groin while attempting to subdue an arrestee who offered violent resistance.

Petitioner's treating physician, Dante A. Trovato, M.D., an orthopedic surgeon, examined him on August 7, 2003. Ruling out "disc herniation," Dr. Trovato diagnosed petitioner as suffering from "lumbar strain," and recommended that he be assigned "none patrol work, desk work." From August 2003 to October 2003, petitioner underwent medical treatment, including pain medications, physical therapy, MRI's and orthopedic follow-up examinations. Following a physical examination on November 3, 2003, Dr. Trovato diagnosed petitioner with "[i]mproving lower back pain." Dr. Trovato ruled-out "lumbar radiculopathy," and noted that petitioner could return to "full duty on 11/10/03." NYPD records indicate that petitioner returned to full duty status on November 4, 2003.

On October 26, 2004, petitioner applied for accidental disability benefits claiming to be permanently disabled due to the April 1, 2003 line-of-duty accident. Thereafter, the Police Commissioner submitted an application for ordinary disability benefits on petitioner's behalf.

On March 30, 2005, the Medical Board Police Pension Fund, Article II (the "Medical Board") unanimously recommended to the Board of Trustees that petitioner be retired for ordinary rather than accidental disability. The Medical Board concluded that the documentary and clinical evidence established that petitioner was unable to perform the duties of a police officer due to lumbosacral arthritis, but the Board was of the view that petitioner's disability was not caused by a line-of-duty injury.

On October 12, 2005, the Board of Trustees remanded petitioner's case to the Medical Board for re-evaluation in light of new evidence. On December 7, 2005, the Medical Board considered petitioner's application for a second time, noting that "[n]o additional medical documentation has been submitted." After examining petitioner and reviewing the submissions, the Medical Board reaffirmed its previous recommendation that petitioner be retired for ordinary rather than accidental disability. In its second report, the Board stated that it "failed to find that the line of duty injuries, including that of August 1, 2003, were disabling and the competent causal factor" of petitioner's arthritic condition. On May 10, 2006, by a tie vote of six-to-six, the Board of Trustees denied petitioner's application for an accident disability pension and retired petitioner on ordinary disability benefits.

DISCUSSION

Petitioner argues that respondents' denial of his application for accidental disability benefits is arbitrary, capricious and contrary to law. Specifically, petitioner asserts that in assessing his application, the Board of Trustees merely adopted the recommendation by the Medical Board which, in turn, failed to apply the proper standard of causation set forth in *Matter of Tobin v Steisel* (64 NY2d 254 [1985]), wherein the Court of Appeals held that, for purposes of accidental disability benefits under the New York City Administrative Code, "[a]n accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury" (*id.* at 259). By verified answer, respondents assert that the Medical Board's determination that petitioner's disability was due to lumbosacral arthritis and not to his line-of-duty accident of August 1, 2003 is supported by credible medical evidence in the record and is neither arbitrary nor capricious.

Accident disability retirement 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 question of whether the petitioner has the injuries claimed and whether the injuries incapacitates the petitioner from the performance of duty is solely for the Medical Board (*Matter of Quill v Ward*, 138 AD2d 305 [1988]). If the Medical Board concludes that a member is disabled, the Board of Trustees must then make its own evaluation as to the Medical Board's recommendation regarding the cause of the disability (*Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]); *Pamlayne v McGuire*, 111 AD2d 721 [1985]; *Matter of Curran v McGuire*, 87 AD2d 223 [1982]). Where, as here, the determination of

the Board of Trustees is the result of a tie vote, the Board must retire the applicant on an ordinary disability pension (*see Matter of City of New York v Schoeck*, 294 NY 559, 568 [1945]; *Matter of Meyer v Board of Trustees*, 90 NY2d 139, 144-145 [1997]), and the Board's decision can be set aside on 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 (*id.* at 145; *Matter of Canfora v Board of Trustees*, 60 NY2d 347, 352 [1983]; *Matter of Causarano v Board of Trustees*, 178 AD2d 474 [1991]). The petitioner has the burden of establishing that a causal relationship exists between the service-related accident and the claimed disability (*see Matter of Nicolosi v Board of Trustees*, 198 AD2d 282, 283 [1993], *lv denied*, 83 NY2d 752 [1994]; *Matter of Draves v Board of Trustees*, 203 AD2d 568, 569 [1994]), and there is no presumption in his or her favor which the Board of Trustees must overcome (*see Matter of Archul v Board of Trustees*, 93 AD2d 716, 717 [1983], *affd* 60 NY2d 567 [1983]).

The standard of review for an Article 78 proceeding challenging a determination as to disability benefits is whether the Medical Board's decision "lacks a rational basis, or is arbitrary or capricious" (*Borenstein*, 88 NY2d at 760). A Medical Board's disability determination will ordinarily not be disturbed if it is based upon "substantial evidence" which, in turn, is defined as some credible evidence to support the Board's findings (*id.* at 760-761; *see also Drayson v Board of Trustees*, 37 AD2d 378, 380 [1971], *affd* 32 NY2d 852 [1973]). Thus, the court may not disturb the final award "as long as there was any credible evidence of lack of causation before the Board of Trustees" (*Meyer*, 90 NY2d at 145). 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 (*id.* at 152).

Applying these principles to the instant case, the court finds that there is no basis for disturbing the determination of the Board of Trustees. In concluding that petitioner's disability was not caused by a service-related injury, the Medical Board based its decision on a review of the NYPD's departmental records, the medical file submitted by petitioner, and its own interview and physical examination of petitioner. With respect to the documentary evidence, the Board stated the following in its March 30, 2005 report:

"3. There is a history of a non-line of duty incident on December 24, 1989. Multiple traumas were noted with severe pain of the lumbosacral spine with contusions to the pelvis. The officer was on restricted duty from an automobile accident. He notes that he was out from January 30, 1990 to February 28, 1990 again due to multiple traumas with an acute sprain of the cervical area. He was again out with tenderness and back spasms and recommended to physical therapy from November 21, 1992 to November 25, 1992 due to a neck, shoulder and back injury. There is also an incapacitation from work on November 24, 1992 to December 2, 1992 for neck and back strain. There is a notation from a non-line of duty accident on November 27, 1994 with a complaint of back pain radiating to the hips.

"4. There is a complaint of severe back pain on June 8, 2001 when [petitioner] presented to Dr. John Reilly, a police surgeon where he had given a diagnosis of left syiatica and back pain and was out from June 21, 2001 through July 12, 2001, a period of three weeks. He continued to have severe pain in his back and was given another related sick leave until July 14, 2001. Officer Simpson continued to be out of work and continued to be off full duty based on an office visit of October 26, 2001 again related to back pain and spasms with a decreased range of motion. On November 21, 2001 an antalgic gait was noted referring the officer to desk duty.

"5. There is a note of physical therapy from Dr. Ann Brutus on July 16, 2001.

"6. On October 29, 2001 there is a notation from Dr. Durant that the officer should be out of work until further notice with no lifting or pulling.

"7. There is a note from Dr. Anandu dated June 20, 2003 noting the officer presented with ligament muscle skeletal pain to the left groin. He notes the officer should have an expected recovery in three weeks.

"8. Officer Simpson had a line of duty injury on August 1, 2003. During an arrest, he struggled injuring his back and groin area.

- “9. There is an emergency room report August 1, 2003 from New York Methodist Hospital with a complaint of back pain radiating to the left lower extremity and left groin.
- “10. There is a note on August 7, 2003 from Dr. Trovato noting lumbosacral sprain.
- “11. On August 8, 2003 there are physical therapy notes.
- “12. There is a report from Dr. Trovato dated August 22, 2003 indicating lumbar strain, ruling out disc herniation.
- “13. On September 17, 2003 there is a notation of continued left hip pain. A note from Dr. Trovato on September 17, 2003 indicates no exercise or heavy lifting. There is also an assessment from Dr. Trovato on September 17, 2003 which rules out labral tear of the left hip, rule out internal derangement of the left hip and improving lower back pain.
- “14. On October 14, 2003 the officer had an MRI of the left hip showing a negative MRI of the left hip.
- “15. On October 8, 2003 there is an assessment from Dr. Trovato stating continuing lower back pain.
- “16. On November 10, 2003 there is a note from Dr. Trovato that the officer would be able to return to full duty on November 10, 2003 without restrictions.
- “17. There is a note from Dr. Reina stating the officer was seen on May 8, 2004 for the complaint of muscle spasm.
- “18. On May 18, 2004 there is a note from Dr. Reina with the complaint of lumbosacral sprain.
- “19. On September 1, 2004 there is also a note from Dr. Reina stating back pain/radiculopathy.
- “20. On October 25, 2004 there is a note from Dr. Trovato stating disc disease of lumbar spine.

"21. On November 22, 2004 there is a note from Dr. Durant which notes an MRI results from September 19, 2004 with a summary of disc desiccation associated with a bulging disc at L4-L5 and L5-S1. Small left parasagittal disc herniation at L5-S1. Small central disc herniation at L4-L5 without significant interval change in comparison with the prior study of July 10, 2001. Small disc bulges at L2-L3 and L3-L4, not seen in the prior study. X-rays showed slight evidence of osteoarthritic changes.

"22. On December 6, 2004 there is a procedural note of lumbar epidural steroid injections to the L4-5 inner space. On December 16, 2004 there is a note from Dr. Figueroa noting an epidural steroid injection on December 6, 2004 with 30% relief from this pain."

With respect to its own interview and physical examination of petitioner, the Board stated, in pertinent part:

"23. On interview today, the officer states he is unable to perform his duties as a police officer because of continued back pain. He states he has pain in his left hip and that radiates down the left lower extremity. The officer also states that coughing and sneezing exacerbates his discomfort. He states his pain today is an 8 out of 10 and this is constant. The Medical Board reviewed numerous off duty injuries with the officer, in addition to the August 1, 2003 incident. The officer seemed to have difficulty recalling the documentation of the numerous off duty incidents. There were significant periods of time during which the officer was either on limited or restricted duty due to multiple off duty back injuries. The officer states he has been unable to run or struggle with a perpetrator. His stated weight is 270 lbs. and height is 6'4.

"24. On physical examination today, the officer walks with a slightly antalgic gait. The range of motion of the lumbosacral spine is limited and the left paraspine is spasmodic and there is tenderness along the left lumbar paraspine muscles. The seated straight leg raise was positive with the point of back pain at 70 degrees on the left and negative at 90 degrees on the right. The motor testing revealed a 3 out of 5 hip flexor on the left and 5 out of 5 on the right. Hip adductors 5 out of 5 and abductors 5 out of 5. Quadriceps strength on the right of 5 minus out of 5 and on the left ... 4 out of 5. Hamstrings 4 out of 5 bi-laterally. Dorsiflexion, plantar flexion, inversion, and eversion rated 5 out of 5 bi-laterally. EHL 4 plus out of 5 on the left, and 5 out of 5 on the right. Most weakness was accompanied by discomfort. During the examination the applicant was given a chance to rest. He was told to let the examiners know if he had experienced discomfort. The examination at the time was stopped and then it continued at mutual consent. The sensation was intact. Deep tendon reflexes were trace[d] throughout. With regard to the applicant's complaint of groin pain, Dr. Cohen performed an examination of that area and it did not reveal

any evidence of hernias.”

Finally, in reaching its determination that petitioner’s disability was caused by a degenerative arthritic condition, the Medical Board stated, in pertinent part:

“25. The Medical Board finds that the documentary evidence substantiates that this officer is disabled from performing his duties as a police officer. However, with regards to progress, the Medical Board finds degenerative changes on the MRI which are consistent with his age and also notes a history of chronic low back pain which has been disabling. This has resulted in long periods of time out of work with similar complaints of left sciatica and has been well documented with MRIs as far back as 2001. The Medical Board also notes that aside from a comment of new disc bulges, the MRIs were essentially unchanged from 2001 and a previous MRI of September 22, 2004. The Medical Board also notes a clearance to perform full duty following [an] August 1, 2003 incident. The Medical Board feels that the incident of August 1, 2003 is not the competent causal factor of his disability which, at best represented an exacerbation, not an aggravation, of his underlying previous condition which is well documented on his medical records.”

The court finds that the determination of the Board of Trustees that petitioner’s disability was not a natural and proximate result of a service-related accident is supported by credible evidence in the record (*see Matter of Kmiotek v Board of Trustees*, 232 AD2d 640, 648 [1996]). While it is true, as petitioner asserts, that a service-related accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition may be a proximate cause of that injury for purposes of awarding accidental disability benefits (*see Tobin*, 64 NY2d at 259), here, petitioner has failed to offer any medical evidence to support the conclusion that the line-of-duty injury he sustained on August 1, 2003 either precipitated the development of his arthritic condition or aggravated it to the point where it became disabling (*see Matter of Wolyniec v Board of Trustees*, 232 AD2d 495 [1996]). Thus, petitioner has not met his burden of proving, as a matter of law, a causal connection between his line-of-duty injury and his present disability so as to be entitled to accidental disability benefits (*see Causarano*, 178 AD2d at 474). Accordingly, the Board

of Trustees factual findings is supported by substantial evidence, and respondents' determination denying petitioner's application for an accident disability pension is neither arbitrary nor capricious.

CONCLUSION

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

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

DATED: JUL 11 2007



J.S.C.

HON. LELAND DeGRASSE

UNFILED JUDGMENT

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