

Matter of Worrell v Kelly
2007 NY Slip Op 32634(U)
August 16, 2007
Supreme Court, New York County
Docket Number: 0103126/2006
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN
Justice

PART 6

Index Number : 103126/2006

WORRELL, TYRONE

vs

KELLY, RAYMOND

Sequence Number : 002

REARGUMENT/RECONSIDERATION 3

INDEX NO. 103126/04

MOTION DATE 5-1-07

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

this motion to/for reargument

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

FILED

AUG 22 2007

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8-16-07

Eileen Bransten
J.S.C.

Check one: FINAL DISPOSITION

HON. EILEEN BRANSTEN
 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: PART SIX

-----X

In the Matter of the Application of
TYRONE WORRELL,

Index No.: 103126/06
Motion Date: 5/1/07
Mot. Seq. No.:001

Petitioner,

-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

PRESENT: EILEEN BRANSTEN, J.*

FILED
AUG 22 2007
COUNTY CLERK
NEW YORK

Pursuant to CPLR 2221, Tyrone Worrell ("Officer Worrell") moves for reargument of his petition seeking to annul the determination of respondent 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, The Board of Trustees of the Police Pension Fund ("Board of Trustees"), New York City Police Department ("NYPD") and the City of New York (collectively "Respondents"). The determination denied him line-of-duty accident

* The Court thanks Avital Malina, a summer intern, for her valuable assistance with this Decision and Order.

disability retirement allowance (“ADR”) and instead granted him ordinary disability retirement allowance (“ODR”).

In a Decision and Judgment dated December 7, 2006, this Court denied the petition and dismissed the proceeding.

Respondents oppose Officer Worrell’s reargument motion.

Background

On July 25, 2002, Officer Worrell applied for ADR based on right-knee and right-arm injuries he received while on duty (a more in depth discussion of Officer Worrell’s injuries is contained in the December 7, 2006 Decision and Judgment). Reply Affirmation to Respondents’ Opposition to Motion to Reargue (“Reply”), Ex. E, at 4. In response, NYPD submitted an application for Officer Worrell to receive ODR. *Id.* After conducting an examination of Officer Worrell, the Medical Board Police Pension Fund Article II (“the Medical Board”) determined that he had functional range of motion in his knees and shoulders and that he was able to properly fire a weapon and squat. *Id.* Thus, it rejected both the ODR and the ADR applications finding that “there are no significant objective findings precluding the officer from performing the full duties of a New York City Police Officer,” despite Officer Worrell’s physician’s conclusion to the contrary. *Id.*

On May 14, 2003, the Board of Trustees considered the Medical Board's recommendation. The case was remanded back to the Medical Board because of inconsistency in the Medical Board's conclusions. Reply, Ex. E, at 5.

In September 2003, Officer Worrell underwent another right-knee surgery to repair a tear in his lateral meniscus. Reply, Ex. E, at 5. His surgeon subsequently determined that Officer Worrell "will not be able to return to full duties as a New York City Police Office due to Grade III damage to the undersurface of the patella tibial plateau." Reply, Ex. E, at 5.

On April 4, 2004, the Medical Board re-examined Officer Worrell and found "no significant findings precluding the officer from performing the full duties of a New York City Police Officer." Reply, Ex. E., at 5. The Medical Board found that he had full range of motion in his knees and shoulders and could perform deep knee bends. Consequently, once again, it rejected both the ADR and ODR applications. *Id.*

Several months later, NYPD physicians examined Officer Worrell and recommended that he remain on restricted duty. Reply, Ex. E, at 5. His orthopedist similarly opined that Officer Worrell could not sit or stand for prolonged periods of time and that he was unable to run, jump or squat. *Id.*

A surgeon and three physicians on the Medical Board re-examined Officer Worrell, determined that he was able to perform all the functions of a NYPD officer and

denied his applications once more. Reply, Ex. E., at 6. The Board of Trustees, however, was not satisfied and remanded the matter to a new Medical Board consisting of three different physicians. Meanwhile, Officer Worrell returned to full duty. *Id.*

The new Medical Board examined Officer Worrell on July 1, 2005, and found that Officer Worrell was able to squat to 95 degrees, had full range of motion in his right knee, showed no signs of atrophy...did not have any thickening or inflammation in his patella, had full radial, ulnar and median nerve sensation, could squeeze with normal strength, and, had full range of motion in his right wrists, elbow and finger. Reply, Ex. E., at 6. The Medical Board compared these physical findings with Officer Worrell's complaints of severe pain and found that "his subjective complaints are of such a profound nature and the discrepancy in the lack of objective findings leads one to the conclusion that his complaints are due to somatization of both the knee and right arm complaints," meaning that no physical problems supported his pain complaints, which were apparently psychological. *Id.*, at 6-7.

The Medical Board recommended that the Board of Trustees grant Officer Worrell's ODR application and deny his ADR application because his psychological difficulties were not shown to be proximately caused by a service related accident. Reply, Ex. E, at 7.

On November 9, 2005, the Board of Trustees reviewed Officer Worrell's application and adopted the Medical Board's determination to grant ODR and deny ADR by a six-to-six vote (precedent establishes that a tie vote results in denial of an ADR application). Reply, Ex. E, at 7.

Officer Worrell commenced this proceeding, seeking a Judgment annulling the determination that he is only entitled to ODR benefits. He argued that the Medical Board's determination was "arbitrary and capricious because his examining doctors concluded, in stark contrast to the Medical Board's evaluations, that he could not perform the duties of a NYPD police officer based on injuries he sustained on the job." Reply, Ex. E, at 8. He further argued that he was entitled to a hearing to establish his accident disability retirement status. *Id.* Finally, Officer Worrell contended that the Medical Board's diagnosis of "somatization disorder" was not supported by a psychological examination and therefore there was no credible evidence underlying the decision. Reply, Ex. E, at 8. In support of his petition, Officer Worrell submitted medical records detailing his medical history and current medical condition.

Respondents opposed Officer Worrell's petition and argued that their determination was based on credible evidence and was not arbitrary or capricious. Reply, Ex. E, at 8. Additionally, they asserted that Officer Worrell did not meet his burden of demonstrating that his disabling condition was casually linked to the on-duty accidents.

In a Decision and Judgment dated December 7, 2006, this Court denied the petition, explaining that it was “clear that the Board of Trustees’ determination * * * is supported by some credible evidence.” Reply, Ex. E, at 12.

Now, Officer Worrell seeks reargument urging that “this Court misapprehended certain controlling principles of law and overlooked relevant facts.” Affirmation in Support of Motion to Reargue (“Supp.”), at ¶ 3. Specifically, he asserts that Respondents’ determination was irrational as a matter of law because NYPD Orthopedic Surgeons “whose primary job responsibility is to determine the duty status of members” concluded that his knee condition prevented him from performing full duty. *Id.*, at ¶ 6. He further contends that “apparently the Court misconstrued the inequitable legal precedent which will be set if the determination is permitted to stand [because if Respondents] are allowed to ignore their own IME doctor, two [NYPD] Orthopedists and five separate outside specialists, all who found [his] condition to prevent him from performing full police duty * * * then a precedent has been set whereby a diagnosis of somatization could literally be used to deny every single orthopedic disability pension application.” *Id.*, at ¶ 9.

Respondents reiterate that “the Board of Trustees’ finding of causation may not be set aside * * * as long as the determination is rational and supported by ‘some credible evidence.’” Affirmation in Opposition to Petitioner’s Motion to Reargue (“Opp.”), at ¶ 6.

Respondents also point out that the Board of Trustees is entitled to rely on the medical evidence and conclusions of the Medical Board and does not have to determine the actual cause of an officer's disability upon rejecting the conclusion that the injury was service related. *Id.*, at ¶ 7.

Because nothing was overlooked or misapprehended in denying the petition, Officer Worrell's motion for reargument is denied.

Analysis

Pursuant to CPLR 2221, a party may move to reargue a motion upon demonstrating that the court, in issuing its decision "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dept. 1979), *lv. denied* 56 N.Y.2d 507 (1982). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided.". *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992), *lv. denied in part dismissed in part* 80 N.Y.2d 1005 (1992).

Nothing was overlooked or misapprehended here. In issuing the Decision and Judgment, this Court carefully considered and rejected the very same arguments that Officer Worrell raises in this motion.

Credible evidence supported the Board of Trustees' determination. Significantly, the Board of Trustees reviewed reports from the Medical Board's five physical examinations performed by different physicians and Officer Worrell's submissions. Nothing required the Board of Trustees, after weighing the evidence, to accept the conclusions of, among others, Officer Worrell's physicians and reject the Medical Boards' repeated findings. The Medical Boards' findings--that Officer Worrell's pain was not proximately related to his on-duty injuries--is sufficient credible evidence to support denial of his ADR application. It is not for this Court to consider future, factually distinct potential outcomes in other cases. In this case, credible evidence (the Medical Board's conclusions) supported Respondents' determination; therefore, the decision to deny ADR cannot be annulled.

Accordingly, it is ORDERED that Petitioner's motion to reargue is denied.

This constitutes, the Decision and Order of the Court.

Dated: New York, New York
August 16, 2007

ENTER



Hon. Eileen Bransten

