

Matter of Feng v Kelly
2007 NY Slip Op 33506(U)
October 24, 2007
Supreme Court, New York County
Docket Number: 0112359/2006
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HERMAN CAHN**

PART 49

Index Number : 112359/2006

FENG, WILLIAM

vs
KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. _____
MOTION DATE 5/19/07
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

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

PAPERS NUMBERED _____
FILED
OCT 29 2007
NEW YORK
COUNTY CLERKS OFFICE

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

FULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

MOTION CASE IS

10/29/07

Herman Cahn
J.S.C.

Disposition: FINAL DISPOSITION NON-FINAL DISPOSITION

Appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X

In the Matter of the Application of
WILLIAM FENG,

Petitioner,

for a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules

- against -

Index No. 112359/06

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, NEW YORK CITY POLICE
DEPARTMENT and THE CITY OF NEW YORK,

Respondents.

-----X

Herman Cahn, J.

Petitioner, William Feng, commenced this Article 78 proceeding to: (1) annul the respondents' determination, denying him a line of duty accident disability retirement ("ADR") allowance, as arbitrary and capricious, and direct respondents to grant him an ADR pension; or, in the alternative, (2) direct the Board of Trustees of the Police Department Article II Pension Fund (the "Board of Trustees") to conduct a hearing to enable petitioner to present evidence of his entitlement to an ADR pension.

Petitioner also seeks production of all reports, medical records and other documents relating to his condition in the custody of the Board of Trustees and the New York Police Department ("NYPD").

BACKGROUND

Petitioner was appointed to the NYPD on July 18, 1996. He served continuously until his retirement in March 2004.

This proceeding is based on petitioner's request for, and denial of, an ADR allowance due to injuries he allegedly suffered in the line of duty.

To be eligible for an ADR pension, a police officer must show that he is "a member in city-service" who is "physically or mentally incapacitated for the performance of city-service as a natural and proximate result" of an accidental injury suffered during such service. NYC Admin. Code § 13-252.

Petitioner alleges that, during the course of his duties, he sustained the following line of duty injuries: (1) On March 5, 2002, he injured his back and suffered a laceration and bruise to his finger while attempting to disrupt a physical altercation among 50 people; and (2) On November 11, 2003, he injured his back and chest when he fell off a chair while attempting to retrieve a file from an upper shelf.

Due to these injuries, petitioner received authorizations from the NYPD to undergo chiropractic treatments, physical therapy, MRIs, neurological evaluations, acupuncture and orthopedic follow-up exams from November 12, 2001 to April 15, 2003.

Petitioner was also examined by various physicians throughout 2002 and early 2003. Surendranath K. Reddy, M.D., an orthopedic surgeon, examined petitioner from November 21, 2001 to October 17, 2002 and diagnosed him with bulging discs and a herniated disc. Jean Chen, M.D., a psychiatrist, and Lei Ding, M.D., a neurologist, both diagnosed petitioner as having bulging and herniated discs, various spine sprains and strains, and congenital scoliosis. They

maintained that petitioner's condition, irrespective of the scoliosis, was causally connected to the line of duty injuries he suffered. To the contrary, petitioner's own treating physician, Michael G. Neuwirth, M.D., an orthopedic surgeon, opined petitioner's condition was related to his congenital, idiopathic scoliosis, which had been diagnosed in high school. The report also pointed out that from 2002 to 2003 petitioner's condition had worsened, indicating a multilevel cervical disc degeneration, which was a result of his scoliosis.

On May 13, 2003, the NYPD District Surgeon sent a memo to the Supervising Chief Surgeon recommending that petitioner be examined by the Medical Board of the Police Pension Fund, Article II (the "Medical Board") to determine if he was able to perform full duties. On September 24, 2003, petitioner was examined by the Medical Board. It approved petitioner's application for an Ordinary Disability Retirement ("ODR") allowance, but denied his application for an ADR allowance, concluding that his disabilities were a result of congenital scoliosis and not line of duty injuries.

Petitioner's attorney wrote to the Medical Board three months later, requesting that petitioner's disability status be upgraded to ADR. The letter stated that even if there was a pre-existing condition, an accident that aggravates or develops the injury is cause for awarding a disability pension under the Administrative Code, citing *Tobin v Steisel*, 64 NY2d 254, 257 (1985).

On December 21, 2005, the Medical Board reviewed petitioner's case, but again denied the application for ADR. On May 10, 2006, the Board of Trustees concurred with the Medical Board and retired petitioner on an ODR pension.

Consequently, petitioner commenced this Article 78 proceeding on August 31, 2006 to

* 5]
reverse the Medical Board's determination that he should not be awarded an ADR allowance.

DISCUSSION

Administrative agencies are given broad discretion in making decisions on matters within their purview. As a result, judicial review of an agency's determination under CPLR 7803 is very limited. *Canfora v Bd. of Trustees*, 60 NY2d 347, 352 (1983). In this instance, petitioner seeks review pursuant to CPLR 7803(3), that the Board of Trustees' determination was arbitrary and capricious. In deciding that a determination is subject to judicial review, a reviewing court must find that there was no rational basis for the agency's decision. *Pell v Bd. of Educ.*, 24 NY2d 222, 230-31 (1974).

The question of whether an applicant seeking an ADR pension is incapacitated due to a line of duty injury is solely for the Medical Board to decide and its determination on this issue is binding on the Board of Trustees. *Demarco v New York City Employees' Ret. Sys.*, 211 AD2d 594, 595 (1st Dep't 1995). A Medical Board's determination with regard to disability benefits will not be disturbed if it is based on "some credible evidence." *Borenstein v New York City Employees' Ret. Sys.*, 88 NY2d 756, 760 (1996). The Court of Appeals has defined credible evidence as "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered." *Meyer v Bd. of Trustees of the New York City Fire Dep't*, 90 NY2d 139, 147 (1997).

Respondents argue that their determination to retire petitioner on an ODR pension was not arbitrary and capricious and, therefore, cannot be overturned. The Board of Trustees contends that since the Medical Board's determination was based on "some credible evidence," including a physician's report, and as well as its own findings, its decision is binding. As such,

respondents argue that this court may not substitute its judgment for that of the Medical Board. *Id.* at 761.

Respondents also point out that even though there was a difference of medical opinion concerning the cause of petitioner's condition, such as the various spine sprains and herniated discs, the Medical Board fulfilled its duties by resolving these discrepancies. It did so by examining petitioner and all of the treating physicians' reports, before it determined that his condition was a result of his congenital scoliosis.

In response, petitioner contends that the Medical Board's determination was not rational since it did not explain why it disregarded those medical reports that stated his condition was a result of the injuries he suffered in the line of duty. Petitioner argues that the Board of Trustees breached its duty by following the Medical Board's decision, despite the known conflict of medical opinion concerning his condition.

The Medical Board was given reports from various physicians, and also conducted its own examination of petitioner, which indicated to it that petitioner's pre-existing condition made him ineligible for an ADR pension. The Medical Board was presented with the diagnosis of petitioner's own treating physician, who came to the same conclusion as the Medical Board – that the cause of his condition was a result of petitioner's pre-existing congenital scoliosis. Diagnostic tests, including an x-ray report and MRI reports, which corroborated the progressive nature of petitioner's congenital condition, were reviewed. Based on all of this, respondents determined that the standard for retiring petitioner on an ADR allowance was not met.

When there are conflicting medical opinions, the Medical Board “alone ha[s] the authority to resolve such conflicts.” *Id.* Therefore, it was not irrational for the Medical Board to

view the facts in the way it did – concluding that while there was conflicting evidence of the cause of petitioner’s condition, there was credible evidence to support a finding that the primary cause of his disabilities was a pre-existing condition.

As a result, the Court does not find respondents’ determination to be arbitrary and capricious, and the petition is dismissed.

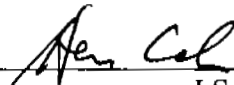
Accordingly, it is

ORDERED that the petition is dismissed in its entirety; and it is further

ORDERED that the Clerk enter judgment accordingly.

Dated: October 24, 2007

ENTER:



J.S.C.

FILED
OCT 29 2007
NEW YORK
COUNTY CLERK'S OFFICE