

**Matter of Reynolds v Kelly**

2007 NY Slip Op 33646(U)

November 2, 2007

Supreme Court, New York County

Docket Number: 0118121/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.  
*Justice*

PART 10

Reynolds, J

INDEX NO.

11812106

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

Kelly, R

- v -

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

**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 11B).

**motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.**

Dated: 11/2/07

J.S.C.

Check one:  FINAL DISPOSITION

JUDITH J. GISCHE, J.S.C.  
 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

-----X  
In the matter of the application of  
James Reynolds

Petitioner,

*for a judgment pursuant to  
Article 78 of the Civil Practice  
Law and Rules*

Decision/Order

Index No.: 118121/06

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

-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  
Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this  
(these) motion(s):

**Papers**

**Numbered**

JR Notice of Petition & Verified Petition w/exhs.....1  
Answer to Verified Petition w/exhs.....2  
-----X

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an Article 78 proceeding. Petitioner seeks a judgment reversing the  
August 9, 2006 decision by the Board of Trustees of the Police Pension Fund that he  
does not have a service related or line of duty disability. Petitioner contends that this  
decision was made without a rationale basis and was arbitrary and capricious.

Petitioner contends that he did, in fact, suffer a line of duty injury ("LOD"), and therefore he is eligible for "accident disability retirement," ("ADR") which entitles him to a higher rate of disability pay.

This is a timely petition seeking review of a final determination by the respondents. It will, therefore, be decided on the merits. Since an Article 78 proceeding is a special proceeding, the court will decide the issues raised on the papers and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial. CPLR § 7804 (h); York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 (1984).

Respondents are the police commissioner, the police pension fund, the medical board, the police department, and the City of New York (collectively "respondents"). They have appeared in this action and answered the petition.

### **Background**

It is undisputed that petitioner joined the police force on January 28, 1981 and served continuously until his retirement on January 31, 2001. On May 8, 1997, while attempting to restrain a prisoner, petitioner fractured his right dominant hand. On March 2, 1998, petitioner underwent an MRI of the right hand which revealed a chronic second metacarpal fracture with volar angulation and thickened collateral ligaments. On March 13, 1998, surgery was performed on petitioner's right hand, which included an osteotomy and excision of a bone spur.

On May 20, 1999, petitioner filed an application for ADR as a result of his hand injury. In his ADR application, petitioner claimed that as a result of a LOD injury to his right dominant shooting hand, he is entitled to ADR. Petitioner also claimed he had loss

of strength in his hand, that he is unable to make a closed fist, and that he experiences pain. He further claimed that he wakes up with a pins and needles sensation in his hand and is unable to handle his firearm.

On November 18, 1999 petitioner performed the firearm's qualification test and failed to qualify to carry a firearm.

On November 22, 1999, the Medical Board Police Pension Fund ("Medical Board") reviewed and evaluated petitioner's case. Based on a review of the petitioner's entire file, including history, medical documentation, an interview with petitioner, review of x-rays and a physical examination, the Medical Board concluded that petitioner was capable of performing the full duties of a New York City police officer. Therefore, the Medical Board recommended disapproval of petitioner's application for ADR.

On or around January 22, 2001 petitioner participated in the Fired Practical Qualification Course and qualified to carry a Smith and Wesson 10, which is a standard service revolver. Petitioner then retired nine days later, on January 31, 2001.

On March 12, 2001, pursuant to a request by the Board of Trustees of the Police Pension Fund, the petitioner was examined by the Medical Board for a second time. At the time of this second examination, petitioner was not taking any medications, nor was he undergoing any treatment for his right hand. Upon examination the Medical Board found no atrophy, thenar or hypothenar eminence and it was also noted that the function of deep and superficial flexor tendons for the index finger, and also extensor apparatus and intrinsic apparatus, of the hand were entirely normal. After the review, it was the unanimous opinion of the Medical Board that petitioner did not have a disability

which precluded him from performing the full duties of a New York City Police Officer and therefore, the Medical Board recommended petitioner be denied ADR.

In response to another request by the Police Pension Fund based on new evidence, the Medical Board examined petitioner for a third time on October 29, 2001. The Medical Board reviewed petitioner's entire record, including the reports and test results of numerous physicians which petitioner independently received treatment from. Included in petitioner's record was a letter and report from Dr. Michael Alexiades' examination of the petitioner on July 3, 2001. Dr. Alexiades is an orthopedic surgeon and had been retained by petitioner to examine petitioner and assess his fitness to perform the duties of a police officer. Dr. Alexiades' final assessment concluded that the petitioner was unable to qualify to operate a gun, even though he was physically capable of firing a weapon. After review of the entire record and notwithstanding Dr. Alexiades' recommendation to the contrary, the Medical Board reaffirmed its unanimous decision to recommend disapproval of the petitioner's application for ADR.

In response to yet another request by the Police Pension Fund based on new evidence, the Medical Board conducted a fourth examination of petitioner on or about May 22, 2006. Included in the Medical Board's review were all previous tests, reports and letters from petitioner's physicians. Further, a new report from Dr. Alexiades dated January 16, 2002 was included, in which he noted that petitioner was experiencing pain and symptoms that were consistent with earlier reports and that petitioner stated that his strength and mobility had lessened. The Medical Board conducted an examination of petitioner, which was essentially the same as his previous examinations. The Medical Board reviewed the entire record, including the new report from Dr. Alexiades and

unanimously affirmed its previous decision to recommend disapproval of the petitioner's application for ADR.

After a review of petitioner's case, on August 9, 2006 the Board of Trustees adopted the recommendation of the Medical Board to deny petitioner's application for ADR. A letter dated August 9, 2006 was sent to petitioner notifying him of the Board of Trustees' decision to deny petitioner both ADR.

Petitioner contends that the action of the Board of Trustees in denying him ADR is arbitrary, capricious, unreasonable, and unlawful. Further, petitioner contends that the decision of the Board of Trustees is contrary to the competent evidence establishing that he sustained a LOD disability and that the decision is an abuse of discretion. Petitioner also argues that the Board of Trustees refused to give him a fair and reasonable opportunity by way of notice and hearing to establish his entitlement to an LOD pension.

Respondents contend that the petition fails to allege facts sufficient to state a cause of action under Article 78 of the CPLR and should be dismissed. Respondents further contend that their determination in denying petitioner ADR was supported by credible medical evidence and therefore, was neither arbitrary nor capricious and the request for a trial should be denied. Ultimately, respondents argue that the denial of petitioner's application was lawful and proper and that the court should not substitute its judgment on medical issues for that of the administrative body designated by statute to resolve medical controversies.

## Discussion

An applicant for ADR benefits must prove the existence of a disability and that the disability is causally related to an injury sustained in the line of duty. Matter of Drayson v. Board of Trustees of the Police Pension Fund of the City of New York, Art. 2, 37 AD2d 378 (1<sup>st</sup> Dept. 1971). Although the Board of Trustees ultimately decides whether to grant or deny the application for ADR, the trustees rely on the Medical Board to review the medical evidence and decide the medical issues involved.

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision being challenged has a rational basis. CPLR 7803 (3). Thus, where it is alleged the decision was arbitrary and capricious, or without a rational basis, the petitioner would have to set forth facts that establish it is "without sound basis in reason." Matter of Pell, Jr. v. Board of Educ. of Union Free School District No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County, 34 NY2d 222 at 231 (1974); Matter of Colton, Jr. v. Berman, 21 NY2d 322 (1967). "In an Article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious..." Borenstein v. New York City Employees' Retirement System, 88 NY2d 756 (1996). Thus, the court's review of the decision to deny ADR is limited to whether the Board of Trustees' decision was supported by "some credible evidence" and was not arbitrary and capricious. Drayson v. Board of Trustees of the Police Pension Fund, *supra* at 380. This standard is set because the court lacks the expertise to "weigh the medical evidence or substitute [its] own judgment for that of the Medical Board." Borenstein v. New York City Employees' Retirement System, *supra* at 761.

Petitioner has failed to set forth facts that support his claim that respondents' decision was without any rational basis or that there are any factual disputes that have to be decided at trial in order for the court to apply the law. Therefore, this petition must be denied.

"In determining whether a candidate is medically qualified to serve as a police officer, the appointing authority is entitled to rely upon the findings of its own medical personnel, even if those findings are contrary to those of professionals retained by the candidate, and the judicial function is exhausted once a rational basis for the conclusion is found." Thomas v. Straub, 29 A.D.3d 595, 596 (2<sup>nd</sup> Dept 2006). So long as the administrative determination is not irrational or arbitrary, this Court will not interfere with it. Matter of Verme v. Suffolk County Dept. of Civ. Serv., 5 A.D.3d 498, 498-499 (2<sup>nd</sup> Dept 2004).

This court rejects any suggestion by petitioner that the respondents failed to make an informed decision based on credible medical evidence. An agency has the right to conduct its own testing; it is not bound by the applicant's submissions. Thomas v. Straub, *supra*. Thus, it is of no consequence that the various physicians hired by petitioner obtained a different test result, or have different opinions about petitioner's ability to perform the full duties of a police officer.

Even assuming the medical opinions of the Board of Trustees and the petitioner's retained experts are wholly inconsistent, this does not create a factual dispute for resolution in this matter. It is the Medical Board that decides the *bona fides* of diverse opinions, not the court. McCabe v. Hoberman, 33 AD2d 547, 548 (1<sup>st</sup> Dept 1969). In addition to conducting its own testing, as it has the right to do, the Medical Board

considered the results of the independent examinations by petitioner's independent doctors, which it has no obligation to do.

Respondents have not only thoroughly reviewed petitioner's file, including all independent medical examination reports, but it also conducted four separate personal examinations of the petitioner, all consistently reaching the same result.

Petitioner has failed to set forth any facts or points of law that support this petition for a judicial review of the respondents' decision to deny ADR. The decision is rationally based and respondents followed its own procedures. This court cannot and will not substitute its own judgment for the respondents, therefore its decision, that petitioner is denied ADR remains undisturbed.

Accordingly, respondents' motion is granted, and this petition is hereby dismissed.

### Conclusion

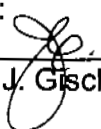
It is hereby

**ORDERED** that the Clerk shall enter judgment in favor of respondents 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, against petitioner James Reynolds, denying the petition in its entirety.

**ORDERED** that this constitutes the decision, order and judgment of the court.

Dated: New York, New York  
November 2, 2007

So Ordered:

  
Hon. Judith J. Gische, J.S.C.

**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 11B)