

**Chin v Kelly**

2007 NY Slip Op 33926(U)

November 29, 2007

Supreme Court, New York County

Docket Number: 0108298/2007

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

**EILEEN A. RAKOWER**

PART Part 5

Index Number : 108298/2007 J.S.C.

CHIN, HARVEY

vs  
KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

1  
2, 3

Cross-Motion:  Yes  No


Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**  
DEC 07 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

Dated: November 29, 2007



**EILEEN A. RAKOWER** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION LSG

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
HARVEY CHIN,

Petitioner,

Index No.  
108298/07

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

- against -

-Decision  
and Order

RAYMOND KELLY, as 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.

**FILED**  
DEC 07 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
HON. EILEEN A. RAKOWER:

Harvey Chin (Petitioner) was appointed as a police officer with the New York City Police Department (City) in October, 1990, after successfully completing all exams and demonstrating that he was physically and mentally fit to perform a police officer's duties. On June 20, 1997, while petitioner was chasing a car, he accidentally discharged his gun. Thereafter, he felt heart palpitations and experienced pain in his back that made him believe that he had pulled a muscle. Petitioner went to the emergency room of New York Hospital Medical Center Queens (the hospital), where an EKG showed, "Atrial fibrillation, ventricular rate 80/min. Right axis deviation." Petitioner was treated with procainamide and discharged the next day .

On March 11, 1998, while off duty, petitioner again went to the hospital emergency room complaining of chest pain and palpitations. He was diagnosed with sinoatrial node dysfunction/atrial fibrillation, and he was discharged the next day with a regular sinus rhythm. A follow-up EKG showed atrial fibrillation/flutter and possible right axis deviation. A physical examination describes his heart as "Normal. There was no mitral regurgitation or S3 gallop and he had an irregularly irregular rhythm."

On May 11, 1998, while off duty, petitioner returned to the hospital emergency room complaining of chest pain and symptoms of "heart burn" following indigestion. He reported that his symptoms were somewhat relieved with Malox. Further examination showed "Borderline Cardiomegaly. Correlate Clinically for a Murmur or Hypertension." Petitioner apparently took an anti-inflammatory drug on an empty stomach. His final diagnosis is listed as "GI upset secondary to NSAID."

On September 12, 1998, after chasing and apprehending a robbery suspect, petitioner complained to his supervisor of pain in his left knee, shortness of breath, lightheadedness and pain in his chest. No medical reports are provided regarding these complaints.

On February 25, 1999, while running down a flight of stairs to assist a fellow officer, petitioner twisted his left ankle, hit his left knee on the railing, experienced chest pain and had shortness of breath. Petitioner went to the hospital emergency room, was treated with propranolol and atenolol, and was released a few hours later.

According to a March 12, 1999, letter from petitioner's commanding officer petitioner told him that he "would no longer run after somebody." The commanding officer wrote to the medical division requesting that petitioner be examined by the police department's cardiologist because petitioner's concerns about his medical condition could put him, his partner and others in jeopardy. Petitioner was re-assigned to station house duties pending the evaluation of the medical unit. The March 15, 2001, report from the police department's medical division diagnoses petitioner with atrial fibrillation which should be treated with beta blockers. It states that his prognosis for return to full duty is unclear but he can return to limited duty. The report concludes "No strenuous activity for now."

On March 30, 2001, petitioner had a Dual Isotope Stress Test, the results of which were largely normal. On September 11, 2001, petitioner was re-assigned to the World Trade Center rescue and recovery operations. On September 20, 2001, petitioner had an EKG which confirmed atrial fibrillation with non-specific ST-T. The results of his September 21, 2001, echocardiography were negative and normal.

On September 25, 2001, petitioner filed an application for Accident Disability Retirement(ADR) benefits stating that he has a heart condition. In response to his application, the Police Commissioner filed an application for Ordinary Disability

Retirement (ODR) benefits.

On October 10, 2001, Petitioner was referred to the medical unit's cardiologist, Dr. Berkowitz, who reported that he believed that petitioner suffered from lone atrial fibrillation and could only serve in a limited capacity until all medical records were reviewed. On November 15, 2001, petitioner's personal cardiologist, Dr. Bruce Goldner, wrote to the police medical unit to inform them that petitioner's atrial fibrillation is triggered by stress and that petitioner should not be involved in strenuous activity. On November 21, 2001, Dr. Berkowitz upgraded petitioner's duty capability to restricted duty. On November 29, 2001, Dr. Goldner submitted another report that reiterated his previous findings and warned that atrial fibrillation can lead to congestive heart failure, stroke and death. On December 14, 2001, petitioner had an exercise stress test. The results were largely normal except for a T-wave inversion that began at two minutes and resolved itself seventeen minutes later.

Petitioner was first interviewed and examined by the Medical Board of the Police Pension Fund (Medical Board) on June 21, 2002, at which time he was working full duty as a police officer. Petitioner reported to the Board that he was not recently involved in any stressful activities. The Medical Board's report reiterates the results of the many medical visits and exams listed above. Petitioner reported to them that upon sudden exertion, he experienced skipped beats, shortness of breath and chest discomfort. The report concludes that

“[b]ased upon a review of the exhibits, present complaints and today's physical examination, it is the unanimous opinion of this Article II Medical Board that this officer cannot perform the full duties of a New York City Police Officer. The Article II Medical Board, therefore, recommends approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the officer's own application for Accident Disability Retirement. The diagnosis is Lone Atrial Fibrillation.”

The following year, petitioner's ADR application was remanded back to the Medical Board in light of “new evidence to be submitted.” On May 16, 2003, the Medical Board again interviewed and examined petitioner, however, its report states that there is no new evidence. The report briefly reiterates the Board's previous findings and states that petitioner retired from full duty status in September, 2002, on Ordinary Disability. At the time of the report, petitioner stated that he worked as a

5 ]

security guard. He reported that he had four or five episodes of palpitations in the previous six months each of which lasted for a few minutes and then subsided. Petitioner stated that many of the episodes occurred at night when he thought he was having nightmares but he also believed that physical exertion may cause them. Petitioner reported that he was taking Toprol AX and Ecotrin.

The May 16, 2003 report concludes that petitioner

“has paroxysmal atrial fibrillation, without any evidence of associated heart disease or hypertension. This is called ‘lone atrial fibrillation,’ the cause of which is not known. Hence, it is the unanimous opinion of the Article II Medical Board that although his episodes of rhythm disorder may be precipitated by stress and physical exertion, the underlying cause is not either of these factors. Hence, the Article II Medical Board reaffirms its previous decision of approval of the Police Commissioner’s application for Ordinary Disability Retirement and disapproval of the officer’s own application for Accident Disability Retirement under the provisions of the Heart Bill.”

Petitioner now seeks a judgment pursuant to Article 78 reviewing and annulling City’s denial of ADR benefits, a declaration that its action was arbitrary and capricious and an order directing City to retire petitioner with ADR benefits. In the alternative, Petitioner requests a hearing on the factual issues presented here, or a direction that the Board of Trustees allow petitioner to present testimony at a hearing before the Trustees to prove his entitlement to ADR benefits. City submits an answer opposing petitioner’s application. Petitioner does not reply.

The judicial review of an administrative determination is limited to the grounds invoked by the agency. (*Lindemann v. American Horse Shows Assn.*, 222 A.D.2d 248, 250 [1<sup>st</sup> Dept. 1995]). The reviewing court may not substitute its judgment for that of the agency’s determination but must decide if the agency’s decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1<sup>st</sup> Dept. 1983]). Once the court finds a rational basis exists for the agency’s determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269 [1972]). The court may only declare an agency’s determination “arbitrary and capricious” if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

“In an Article 78 proceeding challenging [a] disability determination, the Medical Board’s finding will be sustained unless it lacks rational basis, or is arbitrary or capricious.” (*Matter of Borenstein v. New York City Employees’ Retirement System, et al.*, 88 N.Y. 2d 756 [1996], *citations omitted*). Additionally, “a Medical Board’s disability determination will not be disturbed if the determination is based on substantial evidence. While the quantum of evidence that meets the ‘substantial’ threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require “some credible evidence.” (*Id.*)

Often the medical evidence submitted by a retiring officer is subject to conflicting interpretations. If the Medical Board’s report regarding the officer’s disability differs from the medical opinions of Petitioner’s doctors, the Board of Trustees is “entitled to rely upon the unanimous opinion of the members of the Medical Board.” (*Matter of Spiro v. Ward*, 159 A.D.2d 225 [1<sup>st</sup> Dept. 1990]); *Matter of Quilty v. Ward*, 193 A.D.2d 439 [1<sup>st</sup> Dept. 1993]; *Matter of Vecchiarello v. Board of Trustees*, 115 Misc.2d 241 [Sup. Ct. N.Y. Cty. 1982]).

General Municipal Law § 207-k permits police officers to retire with accident disability benefits if they suffer from “any condition of impairment of health caused by diseases of the heart, or by stroke, resulting in total or partial disability . . . .” However, physical or emotional stress is not believed to be a cause of isolated incidents of atrial fibrillation. Rather, atrial fibrillation is considered stress related when it is accompanied by underlying heart disease. (*Gumbrecht v. McGuire*, 117 AD2d 531 [1<sup>st</sup> Dept. 1986]). Here, as in *Gumbrecht, supra*, neither petitioner’s EKGs nor stress tests show any evidence of underlying heart disease; there is no indication of heart attack, inadequate blood or oxygen flow, or coronary heart disease. Thus, “where the competent medical evidence showed that petitioner’s atrial fibrillation, even though of unknown origin, was not accompanied by underlying heart disease and was therefore not stress related, the Heart Bill presumption was rebutted and the decision of the Board of trustees had a rational basis and should not be disturbed.” (*Id.* at 533).

While the determination of the Medical Board is at odds with the opinion of petitioner’s doctor, the Board of Trustees is entitled to accept the Medical Board’s findings which are rational and supported by credible evidence. (*Matter of Borenstein v. New York City Employees’ Retirement System, et al.*, *supra*; *In Re Richard Locke v. Raymond Kelly, as Police Commissioner of the City of New York*, 38 A.D.3d 363,

[\*7]  
[1<sup>st</sup> Dept. 2007]). Under the circumstances of this case, it cannot be said that the Board of Trustees' decision was arbitrary or capricious. Wherefore it is hereby

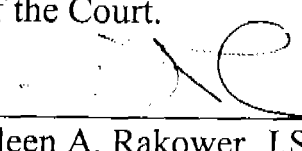
ORDERED that the petition seeking a declaration that the New York City Police Department's Board of Trustees' action was arbitrary and capricious, and an order directing City to retire petitioner with ADR benefits is denied, and it is further

ORDERED that petitioner's requests a hearing on the factual issues presented here, or a direction that the Board of Trustees allow petitioner to present testimony at a hearing before the Trustees to prove his entitlement to ADR benefits is denied.

All other relief requested is denied.

This constitutes the decision and order of the Court.

Dated: November 29, 2007

  
\_\_\_\_\_  
Eileen A. Rakover, J.S.C.

**FILED**  
DEC 07 2007  
NEW YORK  
COUNTY CLERK'S OFFICE