

Hickey v Kelly

2007 NY Slip Op 34041(U)

December 7, 2007

Supreme Court, New York County

Docket Number: 0103902/2007

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

PRESENT: EILEEN A. RAKOWER

PART 5

J.S.C. Justice

Thomas Hickey

INDEX NO. 103902107

MOTION DATE _____

- v -

MOTION SEQ. NO. 03

Raymond Kelly

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 ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

DEC 14 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/7/07

Eileen A. Rakower
EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION *J.S.C.*

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: PART 5

-----X
THOMAS HICKEY,

Petitioner,

Index No.
103902/07

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

- against -

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.

Decision
and Order

FILED
DEC 14 2007
NEW YORK
COUNTY CLERK'S OFFICE
Mot. 5003

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

Petitioner originally filed this Article 78 proceeding in March, 2007 seeking an order from the court reviewing and annulling City's denial of Accident Disability Retirement (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 sought 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. The petition was denied on June 29, 2007.

Unbeknownst to this court, another Justice (who had recused herself) had granted petitioner an adjournment until June 28, 2007, for his reply brief. On July 5, 2007, the court received a phone call from the other Justice's chambers stating that they had just received a reply brief in this matter. Since a decision had already been rendered, this Court asked that the reply brief be marked to indicate that it had not been considered and forwarded it to the County Clerk's file. Thereafter, petitioner filed a motion to reargue based on the court's not having considered his reply when deciding the petition. However, petitioner failed to include a copy of the reply in the motion to re-argue and therefore, by decision dated September 7, 2007, this court

denied petitioner's motion. By letter dated September 25, 2007, petitioner wrote to the Chief Administrative Judge to complain that his reply brief was not considered, never mentioning that this court was never in possession of a reply from him. Thereafter, this matter was re-calendared for the court to consider petitioner's reply brief, and the County Clerk's file was requisitioned so as to place the reply before this Court.

Petitioner's reply lists a litany of line of duty injuries that he failed to include in his moving papers. Specifically, on April 12, 1988, while attempting to handcuff a prisoner, petitioner suffered an injury to his left wrist. On April 6, 1990, petitioner was in a car accident and suffered injuries to his neck, back and left ankle. On October 2, 1991, while assisting in an arrest, petitioner injured his right wrist. On February 4, 1993, while effecting an arrest, petitioner suffered injuries to his left foot and left hand. On April 19, 2005, while searching a vouchered car, petitioner suffered the injury to his left wrist which was the basis of his August 26, 2005 application for ADR. It should be noted that the day before, August 25, 2005, petitioner tripped and fell in the precinct and injured his right ankle, right wrist and left shoulder. This incident was the basis of another application for ADR, although petitioner does not address the Medical Board's denial of ADR on the basis of these injuries in his papers.¹

In his moving papers, petitioner states that he seeks a judgment pursuant to Article 78:

- A. reviewing and annulling the action of the respondents herein denying petitioner a line of duty accident disability retirement allowance pursuant to the Administrative Code §13-252 and declaring said action to be arbitrary, capricious, unreasonable and unlawful; and
- B. directing and ordering the respondents to retire petitioner with a line of duty accident disability retirement allowance;
- C. directing a hearing on the factual issues raised herein; or in the alternative
- D. directing that the Board of Trustees of the Police Department Article II Pension Fund allow petitioner and/or his

¹Respondents aver that this later application was, in fact, petitioner's third application for accident disability retirement.

representatives to present such testimony as is necessary at a hearing held before the Board of Trustees in order to prove his entitlement to an accident disability retirement.

However, in his reply brief, petitioner states for the first time: "Please note, petitioner is not asking the Court to find petitioner disabled or substitute its judgment for that of the Medical Board. Petitioner is asking that the Court remand petitioner's application with the instruction that the Medical Board consider all evidence available and articulate the reasoning behind their determination." He states that the purpose of this remand would be "a more appropriate review with specific instructions as to what the review should entail." The remainder of petitioner's reply brief cites to cases that support his position. Petitioner argues that these decisions demonstrate a "pattern of impropriety," and a disregard for specific standards, requirements and the "controlling tenants of the disability pension laws."

Petitioner's application dated August 26, 2005, requests accident disability based on his April, 2005, injury where, while searching a vouchered car, "the rear seat came forward and struck his left wrist." An April 28, 2005 report from petitioner's personal physician, Dr. Lee M. Kupersmith, states that petitioner's past medical history did not contribute to this injury. Petitioner underwent surgery in June, 2005, and went to physical therapy until November, 2005. The sequence of further medical events is stated in the court's June 29, 2007, decision.

Petitioner's first examination by the Medical Board of the Police Pension Fund (Medical Board) was in January, 2006, after he retired. The Medical Board's report states that "there were no significant objective findings precluding the detective from performing the full duties of a New York City Police Officer." It concludes, "[i]n light of that, the Article II Medical Board recommends disapproval of the detective's own application for Accident Disability Retirement and disapproval of the Police Commissioner's application for Ordinary Disability Retirement."

The Board of Trustees remanded petitioner's ADR application back to the Medical Board in light of "new evidence to be submitted." This new evidence pertained only to his August 26, 2005 application for ADR regarding his left wrist injury and not to his later application for ADR regarding his injured right ankle, right wrist and left shoulder. The new evidence is as stated in the court's decision of June 29, 2007.

On July 18, 2006, Petitioner appeared again before the Medical Board. It reviewed the reports from Petitioner's own doctors and again examined him. The Board's report concludes that "there were no significant objective findings precluding the detective from performing the full duties of a New York City Police Officer. In light of this, the Article II Medical Board reaffirms their previous decision and unanimously recommends disapproval for Accident Disability Retirement and disapproval of the Police Commissioner's application for Ordinary Disability Retirement."

A court may only interfere with the determination of an administrative agency if there is no rational basis or foundation in fact for the action complained of, and the exercise of discretion is arbitrary and capricious. Where a reviewing court finds that the administrative body has not acted arbitrarily but within its lawful authority, the court has no alternative but must confirm the determination. (*Matter of Pell v. Board of Educ.*, 34 NY2d 222. (1974)). 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 [1st Dept. 1983]).

"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 [1st Dept. 1990]); *Matter of Quilty v. Ward*, 193 A.D.2d 439 [1st Dept. 1993]; *Matter of Vecchiarello v. Board of Trustees*, 115 Misc.2d 241 [Sup. Ct. N.Y. Cty. 1982]").

Dr. Kupersmith, in his February 28, 2006 report concluded that petitioner continued "to have problems . . . with loss of range of motion and grip strength. This


significantly interferes with his ability to be a police officer at this time and as such will always continue to interfere with him being a police officer.” However, a June 5, 2006, report by another of petitioner’s personal physicians, Dr. Kenneth D. Montgomery, states that petitioner “has some ulnar-sided wrist pain one year after his surgical TFCC repair. I have discussed with him that it is not uncommon for this injury to take eighteen months to two years to reach his maximum recovery due to maturing scar tissue in the region”

Here, Dr. Kupersmith, who performed petitioner’s surgery, believes that his injuries are permanent and that petitioner could never return to full duty. Another orthopedist states that petitioner’s injury “may interfere” with his police duties. Three other orthopedists that petitioner consulted offer no opinion as to how his injury might affect his ability to perform his police duties. In sharp contrast to Dr. Kupersmith’s opinion, the three doctors on the Police Department Medical Board have twice found that not only is petitioner not eligible for Accident Disability Retirement, but, in fact, he is not even eligible for Ordinary Disability Retirement. Instead, they state, that petitioner is physically able to return to full duty.

While the determination of the Medical Board is at odds with the opinions of two of petitioner’s five orthopedists, 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, [1st Dept. 2007]). Under the circumstances of this case, it cannot be said that the Board of Trustees’ decision was arbitrary or capricious and the court declines to remand this matter back to the Medical Board with instructions as to what their review should entail. 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 or conduct a hearing is denied.

Dated: December 7, 2007



Eileen A. Rakower, J.S.C.

FILED
DEC 14 2007
NEW YORK
COUNTY CLERK'S OFFICE