

Imperati v Kelly

2007 NY Slip Op 34175(U)

December 17, 2007

Supreme Court, New York County

Docket Number: 0100432/2007

Judge: Nicholas Figueroa

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

PRESENT: HON. NICHOLAS FIGUEROA

PART 46

Index Number : 100432/2007

IMPERATI, WAYNE

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. 100432/07

MOTION DATE 5/4/07

MOTION SEQ. NO. 001

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

See accompanying decision and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: December 17, 2007

[Signature]

J.S.C.

Check one: FINAL DISPOSITION 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: PART 46

Index No. 100432/07

In the Matter of the Application of

WAYNE IMPERATI,

**DECISION AND
JUDGMENT**

For a Judgment under Article 78 of the Civil Practice
Law and Rules,

Petitioner,

- against -

RAYMOND K ELLY, 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
NEW YORK,

Respondents.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be given based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1210).

Nicholas Figueroa, J.:

Petitioner seeks to reverse and annul respondents' determination denying him a line of duty
accident disability retirement pension (ADR).

Petitioner sought the ADR on the ground that he received numerous line of duty injuries to
his back, shoulder and neck. He asserted that he was in "constant pain" and could "no longer
perform [his] police duties at 100%." Following the Police Department's usual practice, respondent
Police Commissioner applied for ordinary Disability Retirement (ODR), on petitioner's behalf
following the petitioner's ADR application.

Respondent's Medical Board considered petitioner's ADR application and the
commissioner's ODR application on four occasions. After reviewing all of the evidence, including

several physician reports, medical tests and related evidence, the Medical Board concluded that there were no objective findings precluding petitioner from performing his duties as a police officer. The Medical Board's recommendation to the respondent Board of Trustees was to deny both, the ADR and ODR applications. This final determination was made after the Board of Trustees remanded the applications to the Medical Board twice.

The Medical Board first reviewed petitioner's ADR application on July 23, 2005. It interviewed and examined petitioner. It reviewed his medical history and records, including a cervical spine x-ray, magnetic resonance imaging studies (MRIs) and electromyography studies (EMGs).

Petitioner stated that he injured his back on December 8, 1985, during an arrest. He claimed that he was injured again on January 3, 1988, in a police car accident. On March 4, 1990, according to petitioner, he sprained his back and pulled muscles during a foot pursuit. Petitioner told the Medical Board that he injured his back again on February 18, 1998 while removing a tree from a car. He next hurt his back while making an arrest on June 10, 2002. Petitioner also submitted a January 3, 1998 emergency room report of his complaint of left thigh pain.

The Medical Board considered Dr. Anthony Puglisi's January 22, 1998 report. Puglisi, an orthopedist, examined petitioner's dorsal lumbar spine. Puglisi stated, "At this time I really feel the patient is doing well, and I'm sure that after a couple of weeks of further rest and care of his back he should be able to return to his normal work activities."

The Medical Board noted a February 27, 1998, report by Dr. Michael Castehenos, also an orthopedist. His report stated that a radiology study revealed that petitioner's spine was normal.

The Medical Board reviewed the report by petitioner's chiropractor, Salvatore Principe. Principe reported that he was treating petitioner for facet syndrome of the lower spine and discitis.

Principe stated that petitioner could return to work on March 3, 2002; however, Principe recommended that petitioner should receive no physical education, should not lift more than an unspecified number of pounds, should not perform repetitive or aberrant movements, should not stand or sit more than thirty minutes.

The Medical Board reviewed a June 10, 2002 emergency room report from Long Island Jewish Medical Center where petitioner had gone, complaining of a twisted back with lumbrosacral and thoracic spine complaints.

The Medical Board reviewed a June 27, 2002 x-ray report from Dr. Michael Soojian. Soojian's impression was that the studies of petitioner's right knee and lumbar spine were within normal limits. A June 26, 2002 report to Soojian from Dr. Seith Steinnan, which the Medical Board reviewed, stated that petitioner had a herniated disc at L5-S-I, a bulging disc at L4-L5 and degenerative disc disease from L4 to SI. Soojian's August 20, 2002 diagnosis was lumbrosacral sprain, right knee contusion and AC joint separation.

The Medical Board reviewed Dr. Thomas Dowlings July 2, 2002 report. The report noted that petitioner had back pain and that "He has guarding with range of motion but essentially fairly good range of motion of the lumbrosacral spine. There is a slight pelvic shift in terms of analysis. No active spasm or palpable tenderness is notes." Dowling recommended steroid injection and petitioner received them.

A report from Dr. J. Santelli stated that petitioner had lumbrosacral radiculopathy. Dr. Axelrod, an orthopedic surgeon, reported that petitioner's prognosis was fair.

The Medical Board interviewed petitioner on July 23, 2003. He stated that he had back, toe and shoulder pain, constant stiffness and difficulty in standing and sitting for prolonged periods. Petitioner denied any neck pain. He said that he had physical therapy and received steroid injections

and other medications. He noted that after he retired, there was some improvement in his condition.

The Medical Board's physical examination revealed that petitioner walked normally; he could heel and toe walk with difficulty and did not limp. The Medical Board did not detect any range of motion problems and found no evidence of muscle impingement or atrophy.

Based on the records and its tests, the Medical Board found that there was nothing to substantiate petitioner's disability claim; therefore, it recommended disapproval of both the ADR and ODR applications.

Respondent Board of Trustees remanded to the Medical Board on October 2, 2003, based on new evidence. The Board met to consider new material and to conduct a new physical examination on July 14, 2004.

The new evidence consisted of an MRI of petitioner's lumber spine and an operative report.

The film, taken on December 17, 2003, revealed some dessication of certain discs and a central disc bulge, but no nerve root impingement.

The January 20, 2004 operative report by Dr. Laurence Mermelstein listed the various procedures he performed on petitioner. His post-operative diagnosis was discogenic low back pain and internal disc disruption. Mermelstein noted that he did not test petitioner's range of motion. He found that petitioner's hamstring muscles were tight, bilaterally, on a straight leg raising test. Petitioner was neurologically intact and taking Vicodin for pain.

Mermelstein recommended that petitioner should continue to wear a back brace, perform supine stretching and refrain from bending, lifting and twisting. He also noted that petitioner could walk or swim for exercise. He stated that petitioner should see him in a month to determine if he should have physical therapy.

After it examined petitioner, the Medical Board became concerned that petitioner had undergone sudden physical changes. He now walked with a very stiff-legged show gait, with his head tilted to the right. He exhibited scoliosis, a lumber spinal curvature, of about twenty degrees, a condition that was not noted by any of his physicians. The Medical Board noted that although petitioner complained of back pain on his left side, he inclined on his right side. This could otherwise be consistent with impingement, another problem not found on petitioner's previous physical examination. Petitioner also complained that he could not heel and toe walk and that his range of motion and ability to sit were limited due to pain.

The Medical Board noted that the documentation did not support petitioner's claims of increasing pain and that several of his symptoms were consistent with nerve root compression, a condition not revealed on the prior medical examinations. The Medical Board's examination did not detect tight hamstring muscles. The Medical Board also noted that the post-operative report did not mention radiculopathy.

The Medical Board deferred its decision, pending its reevaluation of petitioner, and considered the case again on October 27, 2004, reviewing additional information.

The Medical Board received a report from Dr. Thomas Dowling dated March 18, 2004. Dowling's examination revealed that petitioner had no restriction of motion on straight leg and cross leg raising, no spinal cord injury, normal motor activity, normal reflexes and balance within normal limits. Dowling noted that petitioner was not taking Vicodin or narcotic analgesics.

Dr. Mermelstein provided a new report dated April 20, 2004. This report stated that petitioner did not limp and could walk with a heel and toe walk. He exhibited the inconsistent signs of back flexing and then the reversal of the lordotic curve. Petitioner's forward flexion, rotation and seated straight leg raising and muscle strength were normal. Petitioner exhibited good muscle

strength and flexion in his right foot. His reflexes were symmetric and he could sit and extend his legs perpendicularly without having muscle spasm.

After reviewing the new materials, the Medical Board concluded that the evidence failed to substantiate that petitioner was disabled from performing full police duties. It reaffirmed its prior denial of both ADR and ODR.

Respondent Board of Trustees again remanded the matter on March 9, 2005, based on new evidence that the Medical Board considered on May 17, 2006. The new evidence was a February 7, 2005 MRI of petitioner's lumbar spine. The study revealed an L5-S1 bulge without nerve root displacement. The Medical Board re-interviewed petitioner. He stated that he had two facet block injections that helped his condition, and that for the past one and a half years, he has been taking three to four vicodin daily.

The Medical Board found "that the lack of documentary evidence submitted and the MRI taken 18 months after retirement do not demonstrate that [petitioner] is disabled from performing the usual and customary duties of a New York City Police Sergeant." The Medical Board reaffirmed its previous decision and recommended "disapproval of [petitioner's] own application for Accident Disability Retirement and disapproval of the Police Commissioner's application for ordinary Disability Retirement."

On September 13, 2006, respondent Board of Trustees adopted the Medical Board's recommendation and denied both ADR and ODR retirement. Petitioner now challenges that determination.

The responsibility for determining whether an applicant has an injury or condition that incapacitates that applicant for city service is for the Medical Board whose finding is binding on the Board of Trustees (*Matter of Borenstein v. New York City Employees' Retirement System*, 88 NY2d

756, 760-761). The Medical Board must make the threshold determination of whether an applicant is disabled.

The standard of review of the Medical Board's determination is whether there was any credible evidence that rationally supports its determination (*Matter of Borenstein v. New York City Employees' Retirement System*, *id.* at 761. Moreover, "There should be no judicial interference with the Medical Board's determination on the question of disability when it is supported by credible evidence, as such determination cannot be said to be arbitrary or capricious" (*Matter of Campazzini v. Ward*, 181 AD2d 431, 432, citing *Matter of Manza v. Malcolm*, 44 AD2d 794). A reviewing court may not weigh the medical evidence or substitute its own judgment for that of the Medical Board (*Matter of Borenstein v. New York City Employees' System*, *id.*).

Petitioner submitted evidence of his alleged disability in the form of medical reports, x-ray studies and records. The Medical Board reviewed that material and conducted its own examination. The Medical Board made its finding after four reviews of the medical reports and studies and three physical examinations of petitioner.

The evidence before the Medical Board demonstrated that petitioner had no neurological impairment. Although there was a bulging disc, there was no evidence of nerve impingement. Studies of petitioner's spine yielded normal results. His gait was normal, as were his ranges of motion. His self-described symptoms were inconsistent with the medical findings. Therefore, there was credible evidence demonstrating that petitioner was not disabled.

The court has no basis for finding that the determination was not rational. Nor is there anything in the record indicating that the Medical Board's review was inadequate. The court may not second-guess the Medical Board's determination by giving greater weight to petitioner's contentions than the Medical Board's findings, even if there were medical findings contrary to the

Medical Board's findings (see *Matter of Muffoletto v. New York City Retirement System*, 198 AD2d 7). Rather, the court must, absent a finding of irrationality, defer to the Medical Board's conclusions (see *Matter of Quill v. Ward*, 183 AD2d 305, 307).


Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed.

This constitutes the decision and order of the court.

Dated: December 17, 2007

ENTER



J.S.C.

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 141B).