

Matter of Sullivan v Kelly
2007 NY Slip Op 34187(U)
December 19, 2007
Supreme Court, New York County
Docket Number: 0106135/2007
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN**

PART 57

Index Number : 106135/2007

SULLIVAN, GERARD

vs
KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ were read on this motion to/for Art 78

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

1
2
M1, M2, M3

Memos of Law
Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this

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).

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

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

Dated: 12-19-07


J.S.C.

MARCY S. FRIEDMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

In the Matter of the Application of
GERARD SULLIVAN,
Petitioner,

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

- against -

RAYMOND KELLY, as the Police
Commissioner of the City of New York, et al.,
Respondents.

DECISION/ORDER

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this Article 78 proceeding, petitioner, a retired police officer, seeks to annul a decision of respondent Board of Trustees of the Police Pension Fund, approving the recommendation of the Medical Board Police Pension Fund, Article II ("Medical Board") that petitioner be denied accident disability retirement benefits for a knee injury. Petitioner claims that, as the result of a line of duty accident, he is disabled from full duty police work and is entitled to accident disability retirement benefits ("ADR").

Petitioner served as a police officer with the New York Police Department from 1995 until his retirement. On November 26, 1999, petitioner sustained a line of duty accident injury to his left knee and ankle while responding to a disorderly group and a call for assistance. He underwent arthroscopic surgery in April 2000, March 2001, December 2002, and November 2003, and received physical therapy. In June 2001, the Police Commissioner applied on behalf of petitioner for accident disability and ordinary disability retirement benefits. On June 7, 2002, the Medical Board examined petitioner and reviewed medical records in connection with

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petitioner's injury and subsequent treatment. The Medical Board noted that petitioner complained of pain in the knee and that the Board's examination of petitioner revealed no joint effusion and full range of motion of both knees. The Board also noted that the arthroscopic procedure revealed medial osteoarthritis and that the knee pain is not inconsistent with medial osteoarthritis of the knee. The Board found that there were no objective findings precluding petitioner from performing the full duties of a police officer and recommended disapproval of the applications for both accident and ordinary disability retirement.

The Board of Trustees remanded the Police Commissioner's applications to the Medical Board to consider new evidence, including an operative report from petitioner's doctor, Patrick DeRosa. In its June 2003 report, the Medical Board deferred a decision on the disability application pending petitioner's further physical therapy. In May 2004, the Board examined petitioner and reviewed medical records and determined that petitioner was unable to perform the duties of a police officer. The Board found that petitioner had osteoarthritis of the hips and that petitioner's knee pain was secondary to the arthritis and was not secondary to an ACL reconstruction or to a partial ACL tear, noting that the Board's prior examination of the knee revealed that it was stable. The Board recommended ordinary disability retirement benefits ("ODR") based on arthritis of the hip.

In February 2005, the Board of Trustees remanded the application to the Medical Board to consider new evidence, including letters from Dr. DeRosa, in which he opined that petitioner's left knee condition prevents him from returning to work and is not related to the hip osteoarthritis. On May 6, 2005, the Board again examined petitioner and reviewed Dr. DeRosa's letters. The Board noted that petitioner had marked restriction of motion of both hips and gait

disturbances, but found that the left knee was stable. The Board also noted that it agreed with Dr. DeRosa that the hip osteoarthritis had no relationship to the ACL tear of the left knee. The Board further found that the ACL tear had been reconstructed and was functioning well. The Board again concluded that petitioner was disabled as a result of hip osteoarthritis with referred pain to the knee, and it recommended approval of ordinary disability and disapproval of accident disability benefits. On August 10, 2005, the Board of Trustees adopted the Board's recommendation.

On August 17, 2005, petitioner filed another application for ADR, and the Police Commissioner filed an application for ODR on behalf of petitioner. The Medical Board met on January 6, 2006 to review petitioner's application. The Board examined petitioner and reviewed medical records, including a report from Dr. Goldman, an NYPD orthopedic surgeon who examined petitioner in March 2005, and a letter from Dr. DeRosa, dated December 20, 2005. Dr. Goldman's report noted that petitioner had undergone three surgeries and an ACL reconstruction, and found no instability in the left knee. Dr. DeRosa noted that petitioner had been under his care since November 1999 and it was his opinion that petitioner's left knee condition was the main cause of his disability. The Board noted that x-rays showed severe osteoarthritis of both hips, and after examining petitioner, found that the left knee was stable and the loss of motion was related to the osteoarthritis of the hip and not to an internal derangement of the left knee. The Board then recommended disapproval of accident disability and approval of ordinary disability.

In June 2006, the Board of Trustees remanded petitioner's application to the Board to consider new evidence, including a letter from petitioner's attorney. On September 22, 2006, the

Medical Board reviewed the letter from petitioner’s attorney, as well as medical documentation previously submitted and its prior examinations of petitioner, and found that petitioner had recovered from the surgical procedures on the left knee and that the left knee condition did not prevent him from performing full duty. The Board recommended disapproval of accident disability and ordinary disability with regard to the left knee, noting that the hip osteoarthritis would be an indication for ordinary disability if petitioner made such an application. On January 10, 2007, the Board of Trustees adopted the Medical Board’s recommendation to deny petitioner’s application for accident disability and the Police Commissioner’s application on petitioner’s behalf for ordinary disability based on petitioner’s knee injury. Petitioner then commenced the instant proceeding.

As explained by the Court of Appeals in Matter of Borenstein v New York City Empls. Retirement Sys., 88 NY2d 756, 760 [1996]:

The award of accidental disability retirement benefits to a NYCERS applicant is a two-step process (see, Administrative Code of City of NY § 13-168 [a]). The first step involves fact finding by the NYCERS Medical Board (see also, Administrative Code § 13-123 [a] [composition of Medical Board]). After conducting its own medical examination of the applicant and considering the evidence submitted in support of the claim, the Medical Board, as a threshold matter, must certify whether the applicant is actually “physically or mentally incapacitated for the performance of city-service.” (Administrative Code § 13-168 [a].) If the Medical Board concludes that the applicant is disabled, it must then make a recommendation to the Board of Trustees as to whether the disability was “a natural and proximate result of an accidental injury received in such city-service” (id.).

The second step in the process involves the NYCERS Board of Trustees (see also, Administrative Code § 13-103 [b] [composition of Board of Trustees]). If the Medical Board certifies that the applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny applicant’s

claim. The Board of Trustees is equally bound by a Medical Board finding that the applicant is disabled, but in that event it must then make its own evaluation as to the Medical Board's recommendation regarding causation. [emphasis in original]

It thus is well settled that the Board of Trustees is bound by the Medical Board's determination of whether an applicant for disability benefits has a disability. (See Matter of Borenstein, 88 NY2d 756, supra; Matter of Canfora v Bd. of Trustees, 60 NY2d 347 [1983].) Moreover, "[o]rdinarily, a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence [citations omitted]. 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' [citations omitted]." (Matter of Borenstein, 88 NY2d at 760.) Where the medical evidence is conflicting, it is solely within the province of the Medical Board to resolve the conflict. (Id.; Matter of DeNaro v New York City Empls. Retirement Sys., 265 AD2d 215 [1st Dept 1999], lv denied 95 NY2d 769 [2000].) The courts "cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board." (Matter of Santoro v Board of Trustees, 217 AD2d 660 [2d Dept 1995].)

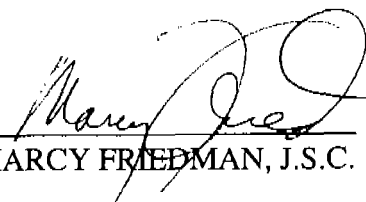
Here, petitioner's treating physician, Dr. DeRosa, concluded that petitioner was unable to perform the duties of a full time police officer as a result of a knee injury sustained in the line of duty. The Medical Board concluded, based on its review of medical records and its own examinations of petitioner, that the knee injury was resolved and that petitioner's disability resulted from osteoarthritis of the hip unrelated to the line of duty knee injury. Although there is a dispute between petitioner's treating physician and the Medical Board as to the cause of petitioner's disability, "where, as here, the medical evidence is subject to conflicting

[* 7]
interpretations, we must defer to the expertise of the Medical Board in resolving such conflict and to the judgment of the Board of Trustees in adopting the Medical Board's findings." (Matter of Mulheren v Board of Trustees of the Police Pension Fund, 307 AD2d 129, 131 [1st Dept 2003], lv denied 100 NY2d 515.)

It is accordingly ORDERED that the petition is dismissed in its entirety.

This constitutes the decision and judgment of the court.

Dated: New York, New York
December 19, 2007


MARCY FRIEDMAN, J.S.C.

FILED 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 1318).