

Matter of Barbour v Kelly

2008 NY Slip Op 30169(U)

January 16, 2008

Supreme Court, New York County

Docket Number: 0103095/2007

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

Barbican, K

INDEX NO. 103095/07

- v -

MOTION DATE _____

Kelly R

MOTION SEQ. NO. 01

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

JAN 22 2008

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 1/16/08

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
In the Matter of the Application of
KEITH BARBOUR

Petitioner,

Index No. 103095/07

For a Judgment under 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.

FILED
JAN 22 2008
NEW YORK
COUNTY CLERKS OFFICE

-----X
Tolub, J.:

In this CPLR Article 78 application, petitioner Keith Barbour seeks an order annulling the respondents' denial of a line of duty accident disability retirement allowance, pursuant to Administrative Code § 13-252, as arbitrary, capricious, unreasonable and unlawful, and directing respondents to retire petitioner with a line of duty accident disability retirement allowance retroactive to the date of his ordinary retirement. In the alternative, petitioner seeks an order directing a hearing on the factual issues raised in this application, or an order directing that the Board of Trustees of the Police Pension Fund, Article II (Board of Trustees) allow petitioner and/or his

representatives to present testimony, as is necessary, at a hearing, in order to prove his entitlement to a line of duty accident disability retirement.

Petitioner also seeks an order, pursuant to CPLR 2307 (a), directing the respondents to serve and file (1) all reports, recommendations, certificates, and other documents submitted to the Board of Trustees in connection with petitioner; (2) copies of the minutes of the Board of Trustees involving petitioner; (3) and copies of all medical records, reports, and notes relating to the petitioner which are on file with the Board of Trustees and/or the New York City Police Department (NYPD).

Background

Petitioner was appointed to the NYPD on July 18, 1996 and, pursuant to New York City Administrative Code § 13-214, was a member of the Pension Fund. On April 21, 2001, petitioner alleges that he sustained a line of duty (LOD) injury to his lower back as he tried to subdue an emotionally disturbed person, who became violent in the process.

On July 2, 2003, petitioner filed an application for a LOD Accident Disability Retirement Pension (ADR) due to the injury of April 21, 2001. In response to the petitioner's application, the Police Commissioner filed an application for an Ordinary Disability Retirement (ODR) on petitioner's behalf.

On April 14, 2004, petitioner was examined by the Medical

Board Police Pension Fund, Article II (the Medical Board).

Petitioner complained of stiffness in his neck, occasional arm pain and intermittent numbness of his fourth and fifth digits on both hands, patchy numbness to the left lower extremity, and back pain. Petitioner's Notice of Petition, Exhibit C, ¶¶ 4 & 7.

The Medical Board approved the Police Commissioner's ODR application and disapproved petitioner's ADR application. The Medical Board diagnosed petitioner with "Diabetic Neuropathy - Moderate to Severe," stating that, in regard to petitioner's orthopedic complaints¹, he showed "evidence of a severe diabetic neuropathy in his lower extremities, as evidenced by the numbness, the absent position in vibration sense, and the areflexia which is present." Petitioner's Notice of Petition, Exhibit C, ¶ 9. There was no explanation as to the cause of petitioner's orthopedic problems.

The Medical Board found the above conditions disabling and unanimously determined that petitioner could no longer perform the full duties of a NYPD officer. The Medical Board noted a previous history of back problems, including an MRI performed in 1999, showing a L4-5 and L5-S1 degenerative disc disease, cardiac and diabetic problems, atrial fibrillation, and hypertension. Petitioner's Notice of Petition, Exhibit C, ¶¶ 4 & 7.

¹ Petitioner also submitted an ADR application pursuant to the Heart Bill, which is currently pending before the Medical Board and is not an issue in this proceeding.

On August 3, 2004, Eric Jacobson, M.D. examined petitioner, at petitioner's request, and diagnosed him with "herniated/bulging/degenerative lumbar disc at L4-5 and L5-S1 and lumbar radiculitis." Respondents' Verified Answer, Exhibit 23. On August 11, 2004, the Board of Trustees reviewed the Medical Board's determination of April 14, 2004, and remanded the matter back to the Medical Board. In the Board of Trustees' meeting, it was stated,

"On [petitioner], we are remanding it with new medical evidence. We would also like to point out to the Medical Board that they never addressed any of [petitioner's] orthopedic complaints or the evidence in the record that points to his orthopedic complaint related to his back. The Medical Board just simply concludes that he has a diabetic neuropathy." Respondents' Verified Answer, Exhibit 26.

On February 8, 2006, the Medical Board re-evaluated the petitioner's application, including the new evidence of Dr. Jacobson's letter, and once again approved petitioner for ODR and disapproved petitioner's application for ADR. The Medical Board's determination of February 8, 2006 restated the content of Dr. Jacobson's letter, and referred the Board of Trustees back to the Medical Board's April 14, 2004 minutes, specifically paragraphs 4, 7, and 8. Respondents' Verified Answer, Exhibit 22. Again, there was no explanation as to the cause of petitioner's orthopedic disability.

On November 8, 2006, the Board of Trustees finalized the ADR denial in a 6/6 tie vote, and petitioner remained retired with an

ODR pension. Petitioner filed this Article 78 proceeding, arguing that the respondents' denial of petitioner's ADR application was legally deficient, as the Medical Board failed to properly articulate the basis for their conclusion, and failed to adequately consider the facts and circumstances. Petitioner further argues that the Board of Trustees failed to realize these deficiencies and failed to afford petitioner a second remand. Respondents oppose this application, and assert that their determination was supported by ample credible evidence.

Discussion

The issue of whether an applicant has the injury claimed and whether that injury renders the applicant disabled is a determination that is made by the Medical Board. *Borenstein v N.Y. City Employees' Retirement System*, 88 NY2d 756, 760 (1996). "In an article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary or capricious." *Id.*

The award of ADR is a two step process. First, the Medical Board "must certify whether the applicant is actually 'physically or mentally incapacitated for the performance of city-service.'" *Borenstein, supra* at 760, citing NYC Administrative Code § 13-168 (a). Second, if the Medical Board finds the applicant disabled, they must make a recommendation as to whether the disability was

a "natural and proximate result of an accidental injury." *Id.* "In the absence of a clear finding by the medical board, a board of trustees' determination regarding entitlement to pension fund benefits lacks a rational basis." *Sailer v McGuire*, 114 AD2d 334 (1st Dept. 1985). However, a court may not disturb the award as long as there was credible evidence as to lack of causation. *Cusick v Kerik*, 305 AD2d 247, 248 (1st Dept 2003).

Here, the Medical Board failed to articulate whether petitioner's disability was the natural and proximate result of his LOD accident, or whether it was a result of another cause. Both determinations by the Medical Board failed to make a specific finding as to any casual connection between petitioner's disability and its possible cause.

On August 11, 2004, when the Board of Trustees remanded the petitioner's application, it specifically stated that the Medical Board never addressed any of petitioner's orthopedic complaints or the evidence in the record that pointed to his orthopedic complaints, and that the Medical Board simply concluded that petitioner had a diabetic neuropathy.

After reviewing the application for a second time, the Medical Board added Dr. Jacobson's diagnosis, without any further explanation, and referred the Board of Trustees back to certain paragraphs of the Medical Board's original determination of April 14, 2004, which the Board of Trustees had previously remanded.

A determination by the Medical Board cannot be said to be rational where the LOD injuries complained of by the petitioner and the said cause of those injuries are not adequately addressed. See *Rodriguez v Bd. of Trs. of N.Y. City Fire Dep't, Article I-B Pension Fund*, 3 AD3d 501, 502 (2nd Dept 2004). Here, the Medical Board's failure to adequately address the injury in question was not rational, and it was not rational of the Board of Trustees to rely on such a determination, particularly when it remanded it the first time, in part, for reasons discussed above.

Further, the credible evidence standard, as relied on by the respondents, requires that the Medical Board explain the basis for its conclusion that causation had not been established. See e.g. *Matter of Meyer v Bd. of Trs. of N.Y. City Fire Dep't*, 90 NY2d 139, 148 (1997). Without such explanation, the issue of whether credible evidence supports the finding of lack of causation cannot be determined by this court. *Id.* at 152.

Accordingly, it is

ADJUDGED that the petitioner's application is granted to the extent of annulling the findings of the Medical Board and the Board of Trustees with respect to the disapproval of petitioner's application for Accident Disability Retirement; and it is further

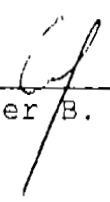
ORDERED that the matter is remitted to the Medical Board which shall, if necessary, conduct an additional hearing before issuing a comprehensive determination on the subject application,

and upon issuance of a comprehensive determination, shall present such to the Board of Trustees.

The remaining relief sought in this petition is denied.

Dated: January 16, 2008

ENTER:



Hon. Walter B. Tolub, J.S.C.

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JAN 22 2008
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