

<b>Matter of Collins v Kelly</b>
2008 NY Slip Op 30887(U)
March 27, 2008
Supreme Court, New York County
Docket Number: 0100297/2008
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART

Justice

Index Number : 100297/2008

COLLINS, DWIGHT

VS.

KELLY, RAYMOND

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 100297-08

MOTION DATE 3/10/08

MOTION SEQ. NO. #001

MOTION CAL. NO.

are read on this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This application is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of Petitioner Dwight Collins, for a judgment annulling the action of the respondents herein Raymond Kelly, as the 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 ("NYC"), denying petitioner an accident disability retirement allowance pursuant to the General Municipal Law § 207-k, and declaring said action to be arbitrary, capricious, unreasonable and unlawful is granted to the extent that that this matter is remanded to the Medical Board and the Board of Trustees of the Police Pension Fund for reconsideration and further proceedings, which shall include specific grounds for its determination; and it is further

Dated: 3/29/08

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 1412).

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

ORDERED that the Board of Trustees is hereby directed to allow petitioner and/or his 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; and it is further

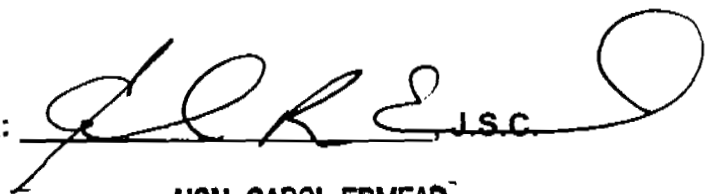
ORDERED that respondents herein are directed to serve and file within 30 days of receipt of a copy of this Order with notice of entry (1) all reports, recommendations, certificates and all other documents submitted to the Board of Trustees in connection with the retirement of the petitioner herein; (2) copies of the minutes of each meeting of said Board of Trustees wherein the Board of Trustees considered, discussed, or acted upon the retirement application of the petitioner; and (3) copies of any and all medical records, reports or notes relating to petitioner which are on file with the Article II Pension Fund and/or the NYPD; and it is further

ORDERED that counsel for petitioner shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

**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 1-400).

Dated 3/27/08

ENTER:



HON. CAROL EDMOAD

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                       REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_ x  
In the Matter of the Application of

DWIGHT COLLINS,

Index No. 100297/08

Petitioner

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

**DECISION/ORDER**

-against-

RAYMOND KELLY, as the 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,

**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  
1427).*

Respondents.

\_\_\_\_\_ x  
EDMEAD, J.S.C.

**MEMORANDUM DECISION**

Petitioner Dwight Collins ("petitioner") moves: (A) for a judgment pursuant to Article 78 (1) reviewing and annulling the action of the respondents herein Raymond Kelly, as the 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 (the "Board of Trustees"), New York City Police Department ("NYPD") and the City of New York ("NYC") (collectively "respondents"), denying petitioner an accident disability retirement allowance pursuant to the General Municipal Law § 207-k (the "Heart Bill"), and declaring said action to be arbitrary, capricious, unreasonable and unlawful; (2) directing and ordering the respondents to retire petitioner with an accident disability retirement allowance retroactive to the

date of his ordinary disability retirement plus interest thereon; or in the alternative (3) directing that the Board of Trustees allow petitioner and/or his 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; (B) for an order, pursuant to CPLR §2307(a), directing the respondents herein to serve and file upon the date hereof (1) all reports, recommendations, certificates and all other documents submitted to the Board of Trustees in connection with the retirement of the petitioner herein; (2) copies of the minutes of each meeting of said Board of Trustees wherein the Board of Trustees considered, discussed, or acted upon the retirement application of the petitioner; and (3) copies of any and all medical records, reports or notes relating to petitioner which are on file with the Article II Pension Fund (the "Pension Fund") and/or the NYPD.

*Background*

Petitioner was born on February 15, 1966. Petitioner was appointed to the uniformed force of the NYPD on July 5, 1989, and served continuously as a member of said NYPD uniformed force, until his retirement for Ordinary Disability Retirement. Prior to petitioner's appointment, petitioner passed all physical and mental examinations administered by the NYPD that demonstrated petitioner to be both physically and mentally fit to perform full duties as a police officer. Petitioner's service with the NYPD during his NYPD employment was satisfactory at all times. Pursuant to New York City Administrative Code § 13-214, petitioner was at all material times hereinafter a member of the Pension Fund, and became such a member on April 30, 1991.

Beginning in April of 2001, petitioner began experiencing shortness of breath with

reduced functional capacity secondary to dyspnea. Initial testing revealed a right bundle branch block pattern. Further testing revealed complete heart block. As a result of his heart condition, petitioner underwent, *inter alia*, implant procedures and cardiac catheterization.

The catheterization revealed, *inter alia*, "moderate pulmonary hypertension."

The hospital records from petitioner's stay at Lenox Hill Hospital on April 23, 2002, mention a history of hypertension.

On August 11, 2003, the Supervising Chief Surgeon received a memorandum with a recommendation that a survey be conducted in order to ascertain whether petitioner was incapacitated for the performance of duty and ought to be retired because he had been on restricted duty since July 31, 2002 due to cardiac disease.

On or about November 15, 2004, based on a recommendation from Dr. Eli J. Kleinman, the NYPD's Supervising Chief Surgeon, the Police Commissioner directed the Medical Board Police Pension Fund, Article II (the "Medical Board") to examine petitioner to determine his eligibility for Ordinary Disability Retirement ("ODR"). On December 17, 2004, the Medical Board examined petitioner based on the Police Commissioner's application for ODR submitted on petitioner's behalf.

In his recommendation to the Police Commissioner, Dr. Kleinman diagnosed petitioner with cardiomyopathy/arrhythmia and reported petitioner's complaints of shortness of breath, on exertion, since September 11, 2001. Dr. Kleinman also noted that petitioner had a history of ventricular tachycardia and severe cardiomyopathy, was taking amioderone, toprol and altace, and that he had a dual chamber pacemaker implantation on November 19, 2001. Dr. Kleinman also stated that petitioner was able to tolerate only mild to moderate activities before developing

cardiac symptoms, and that the NYPD cardiologist felt that petitioner's condition would preclude him from returning to full duty.

After an exhaustive review of petitioner's medical history, records, treatment and a physical examination, the Medical Board recommended that the Police Commissioner's application for ODR filed on petitioner's behalf be approved. The Medical Board offered a diagnosis of Idiopathic (nonischemic) Cardiomyopathy with Heart Block and Tachycardia, and noted that petitioner was Status Post Implantation of Pacemaker/Defibrillator as well.

Thereafter the Board of Trustees concurred.

On March 2, 2005, petitioner submitted an application for Accident Disability Retirement ("ADR") under the provisions of the Heart Bill, claiming that petitioner suffered from heart disease, which necessitated the implantation of a pacemaker/defibrillator. In response to petitioner's application, the Police Commissioner submitted an application for ODR on behalf of petitioner.

On June 24, 2005 the Pension Fund contacted petitioner to inform him that it was unable to process his ADR application due to a lack of communication with petitioner. Petitioner was asked to contact his scheduling supervisor to schedule an appointment for examination by the Medical Board.

From November 4, 2005 through November 2, 2006, petitioner underwent a series of examinations and medical tests.

On February 23, 2007 the Medical Board first considered petitioner's application for ADR, which was the second time the Medical Board considered petitioner's case.

The Medical Board, again, conducted an exhaustive review of petitioner's medical

history, records, treatment and conducted a physical examination.

During the interview with petitioner, he stated that he retired in May 2005, and that at the time of interview, he did not feel that he would be able to perform full duty.

Based upon medical history and records, the clinical findings, and petitioner's complaints and physical examination, the Medical Board opined that "the electrical conduction defects that [petitioner] had were not related to hypertension." Accordingly, the Medical Board recommended approval of the Police Commissioner's application for ODR filed on petitioner's behalf, but disapproval of petitioner's own application for ADR. The Medical Board's final diagnosis was "Idiopathic Cardiomyopathy with Ventricular Tachycardia and Heart Block, Status Post Implantation of Permanent Pacemaker."

On September 12, 2007, the Board of Trustees considered the Medical Board's recommendation regarding petitioner's ADR application. The Board of Trustees rendered a tie vote, six to six, and thereby approved the Police Commissioner's application for ODR filed on petitioner's behalf, and denied petitioner's own application for ADR.

*Petitioner's Contentions*

The action of the Medical Board failed, neglected and refused to use the proper legal test of entitlement to an ADR pension applicable in the circumstances. And, the Medical Board's actions were contrary to the competent evidence establishing that the petitioner has sustained an ADR disability and said action is not based on any competent or substantial evidence. The Medical Board failed to accord or provide petitioner with a fair and reasonable opportunity by way of notice and hearing or otherwise to establish his entitlement to an ADR pension.

Petitioner is entitled to accident disability retirement benefits under the provisions of the

Heart Bill as he has established that he is disabled due to a disease of the heart that was caused by the stress of police work. Additionally, respondents have failed to rebut the presumption that petitioner incurred such heart disease in the performance and discharge of duties with an adequate explanation of their reasoning and consideration.

*Respondents' Opposition*

To be entitled to accident disability retirement pursuant to Administrative Code § 13-252, petitioner must show that he is a member of the Pension Fund, that he is physically or mentally incapacitated for the performance of gainful employment, that his incapacity was the natural and proximate result of an accident not caused by his own willful negligence, and that the accident was sustained in the performance of his duties in active service while a member of the Pension Fund. The Medical Board sufficiently rebutted the presumption provided for in the Heart Bill that petitioner's heart disease was incurred in the performance of his duties.

Analysis

CPLR 7803 states that the court review of an administrative determination consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1<sup>st</sup> Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1<sup>st</sup> Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1<sup>st</sup> Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988] ). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action

is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the administrative determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971] ). Where the administrative interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1<sup>st</sup> Dept.], *aff'd* 66 N.Y.2d 1032 [1985] ).

Moreover, where, as here, the administrative determination involves factual evaluation within an area of the administrative body's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference. *See Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 (1987). Courts are required to "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency. *Town of Henrietta v Department of Env'tl. Conservation*, 76 A.D.2d 215, 224, 430 NYS2d 440, 448 (4<sup>th</sup> Dep't 1980). *See also Jackson*, 67 NY2d at 417, 503 NYS2d at 305; *City of Rome v Department of Health Dept.*, 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4<sup>th</sup> Dep't 1978), *lv. To app. denied*, 46 NY2d 713, 416 NYS2d 1027 (1979).

And, "where evidence conflicts, issues of credibility are the province of an administrative hearing officer, since 'the decisions by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts.' " *Wooten v Finkle*, 285 AD2D 407, 408 (1<sup>st</sup> Dept 2001) (*quoting Berenhaus v Ward*, 70 NY2d 436, 443 (1987).

And the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists ( *Berenhaus*, 70 N.Y.2d at 444, 522

N.Y.S.2d 478, 517 N.E.2d 193; *Matter of Stork Rest. v Boland*, 282 N.Y. 256, 267, 26 N.E.2d 247 [1940]; *Matter of Acosta v Wollett*, 55 N.Y.2d 761, 447 N.Y.S.2d 241, 431 N.E.2d 966 [1981]; *Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 A.D.3d 388, 390, 813 N.Y.S.2d 68 [2006] ).

Generally, an applicant for ADR benefits has the burden of establishing both that he is disabled and that the disability was the result of an accidental injury received in City service. *See e.g., Matter of Danyi v Board of Trustees of New York City Employees' Retirement Sys.*, 176 A.D.2d 451 (1st Dept 1991). However, the Heart Bill grants a police officer disabled due to heart disease an evidentiary presumption that the disabling heart condition is the result of an accidental injury, and that the injury was received in the performance of official duties. *See Uniformed Firefighters Assn., Local 94, IAFF, AFL-CIO v Beekman*, 52 N.Y.2d 463 (1981). The statute provides that the presumption may be overcome by competent evidence to the contrary. General Municipal Law § 207-k(a).

In the instant case, the Medical Board diagnosed petitioner with “Idiopathic (nonischemic) Cardiomyopathy with Heart Block and Ventricular Tachycardia” and “Status Post Implantation of Pacemaker/Defibrillator.”

For an idiopathic heart condition, i.e., one of unknown cause, the presumption can be rebutted when the condition is unaccompanied by coronary artery disease or hypertension. *Goldman v McGuire*, 101 A.D.2d 768 (1st Dept 1984), *affd.* 64 N.Y.2d 1041 (1985) (idiopathic ventricular hypertrophy, because no coronary disease, vital signs within normal limits); *Matter of Vallas v Safir*, 304 A.D.2d 353 (1st Dept 2003) (idiopathic dilated cardiomyopathy unaccompanied by coronary artery disease or hypertension); *accord Matter of Wholihan v*

*Vanessen*, 254 A.D.2d 492 (2d Dept 1998) (mild cardiomyopathy).

The presumption is also rebutted if established medical knowledge demonstrates that the heart disease is congenital, viral, or the result of a childhood disease, such as rheumatic fever.

See *Matter of Burns v Safir*, 305 A.D.2d 142 (1st Dept 2003) (fibrillation was congenital);

*Matter of Lo Pinto v Ward*, 124 A.D.2d 497 (1st Dept 1986) (well-established medical fact that neither physical nor emotional stress causes mitral valve prolapse). Similarly, the presumption is rebutted when medical knowledge establishes that police work cannot cause the heart condition at issue. *Matter of Callaghan v Bratton*, 253 A.D.2d 390 (1st Dept 1998) (no activity or function in the performance of police duties which can predispose or precipitate atrial fibrillation attacks).

In the instant case, respondents have failed to sufficiently rebut the presumptions of the Heart Bill that weigh in petitioner's favor, specifically as to the presence of hypertension. This is indicative that petitioner's idiopathic heart condition is accompanied by hypertension. See, *Goldman v McGuire*, 101 A.D.2d 768 (1st Dept 1984), *affd.* 64 N.Y.2d 1041 (1985).

The medical report of Dr. Raymond Catania, dated November 1, 2006, reads in part as follows:

Shortly after his echocardiogram on 10/17/01, Mr. Collins apparently developed dizziness, lightheadedness, and nausea in addition to his shortness of breath. Follow up EKG revealed complete heart block on 10/30/01. At that time, his blood pressure was 140/84 while in complete heart block with a ventricular escape rhythm between 35 and 40 bpm. This necessitated the implantation of a DDD permanent pacemaker on 11/19/01. A follow up nuclear stress test performed on 01/07/02 revealed a resting blood pressure of 150/90 and a hypertensive response to exercise indicative of labile or *latent hypertension*. His nuclear stress test was negative for ischemia and no LV function was reported with regard to Gated wall motion analysis. However, in March of 2002 a cardiac catheterization revealed normal coronary arteries with reduced left ventricular systolic function and an estimated ejection fraction of 40% *with moderate pulmonary hypertension....*

In summary, Sargent Collins was noted to have a right bundle branch block, which can be a manifestation of stretch and trauma to the conduction system *secondary to hypertension*. He then appeared to develop progressive conduction system disease requiring implantation of a permanent pacemaker in November Of 2001. His initial echo on 10/17/01 revealed normal left ventricular function with an intra ventricular septum measurement at the upper limits of normal. His blood pressure was 140/84. To the contrary, Sargent Collins had risk factors for hypertension, mainly African-American heritage, obstructive sleep apnea, and *documented hypertension followed by its unfortunate complication of progressive conduction disease, dilated cardiomyopathy and ventricular tachy arrhythmias*. [emphasis supplied].

And, as noted earlier, petitioner's catheterization revealed, *inter alia*, "moderate pulmonary hypertension." And, the hospital records from petitioner's stay at Lenox Hill Hospital on April 23, 2002, mention a history of hypertension.

"Where, as here, the decision to deny accident disability benefits to a retired police officer is the result of a tie vote by respondent Board of Trustees of the Police Pension Fund, the determination is subject to judicial annulment only if it can be determined on the record that the retiree is entitled to greater benefits as a matter of law." *Matter of Mejia v Kerik*, 301 A.D.2d 385 (1st Dept 2003).

All would agree that the Board of Trustees is responsible for conducting an independent inquiry into a significant difference of opinion between an independent consulting specialist who examined a petitioner and the Medical Board. *Matter of Brady v City of New York*, 22 NY2d 601 (1968). And, the Board of Trustees has a duty to see that competent evidence be relied upon and sufficient explanations be given by the Medical Board to disprove a petitioner's entitlement to the Heart Bill. (See *Matter of Duester v McGuire*, 81 AD2d 553 (1<sup>st</sup> Dept 1980).

In the instant case, this court finds that the Board of Trustees has not met its duty, and

that the Board of Trustees adopted the Medical Board's conclusory and unexplained decision.

For these reasons, it is hereby

ORDERED and ADJUDGED that the application of Petitioner Dwight Collins, for a judgment annulling the action of the respondents herein Raymond Kelly, as the 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 ("NYC"), denying petitioner an accident disability retirement allowance pursuant to the General Municipal Law § 207-k, and declaring said action to be arbitrary, capricious, unreasonable and unlawful **is granted to the extent** that that this matter is remanded to the Medical Board and the Board of Trustees of the Police Pension Fund for reconsideration and further proceedings, which shall include specific grounds for its determination; and it is further

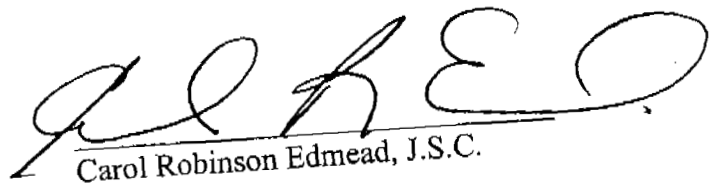
ORDERED that the Board of Trustees is hereby directed to allow petitioner and/or his representatives to present such testimony as is necessary at a hearing held before the Board of Trustees in order to prove his entitlement to an accident disability retirement; and it is further

ORDERED that respondents herein are directed to serve and file within 30 days of receipt of a copy of this Order with notice of entry (1) all reports, recommendations, certificates and all other documents submitted to the Board of Trustees in connection with the retirement of the petitioner herein; (2) copies of the minutes of each meeting of said Board of Trustees wherein the Board of Trustees considered, discussed, or acted upon the retirement application of the petitioner; and (3) copies of any and all medical records, reports or notes relating to petitioner which are on file with the Article II Pension Fund and/or the NYPD; and it is further

ORDERED that counsel for petitioner shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: March 27, 2008



Carol Robinson Edmead, 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 1400)**