

Matter of Kohut v Kelly
2008 NY Slip Op 30997(U)
April 1, 2008
Supreme Court, New York County
Docket Number: 0108297/2007
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. PAUL G. FEINMAN PART 52
Justice

1/M/0 Andrew Kohut

INDEX NO. 108 297 107

- v -

MOTION DATE _____

Raymond Kelly

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for Art. 78

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

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**PETITION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

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).

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

J.S.C.

DATED:

Dated: 4/1/08

Paul G. Feinman

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
In the Matter of the Application of
ANDREW KOHUT,

Petitioner,

Index Number
Mot. Seq. No.

108297/2007
001

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, 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, ORDER AND
JUDGMENT**

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
141E).**

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Papers considered in review of this petition to remand:

Papers	Numbered
Notice of Petition, Affidavits, Memo of Law.....	<u>1,2</u>
Verified Answer, Memo of Law.....	<u>3,4</u>
Reply Memo of Law.....	<u>5</u>

PAUL G. FEINMAN, J.:

Petitioner seeks to annul respondents' determination to deny him line of duty disability retirement benefits and the matter remanded for reconsideration. For the reasons which follow, the petition is denied and the proceeding is dismissed.

Background

Petitioner was appointed to the New York Police Department in 1979 and served continuously as a uniformed member until his retirement in 2001. In February 2001, he applied for Accident Disability Retirement (ADR) due to his lower back and left knee injuries received in the line of duty in 1982, 1984, and 1996. The Police Commissioner made an application on petitioner's behalf for Ordinary Disability Retirement (ODR). Medical reports were submitted and petitioner was examined by respondent's Medical Board Police Pension Fund, Article II (Medical Board), after which the Medical Board found on August 29, 2001 that petitioner did not have a disability which would preclude him for performing the full range of duties of a police officer, and denied petitioner's application and the Police Commissioner's application (Ver. Pet. Ex. G). In December 2001, the Board of Trustees of the Police Pension Fund, Article II (Board of Trustees), remanded the case to the Medical Board for review of new evidence.

In 2002, petitioner underwent additional medical tests as well as arthroscopic surgery on his left knee (Ver. Pet. Ex. I, J, K, L, M, N). The reports from these tests and procedures were evaluated by the Medical Board which, after another examination of petitioner, again disapproved of both his and the Police Commissioner's applications on January 7, 2004, on the basis that the documentary and clinical evidence did not substantiate a disability that would preclude petitioner from performing the full duties of a police officer (Ver. Pet. Ex. O).

Petitioner then underwent further medical tests and procedures in April 2004 (Ver. Pet. Ex. P, Q). The matter was again remanded by the Board of Trustees, and in September 2004, the Medical Board interviewed petitioner, evaluated the medical reports, and once again disapproved of both applications (Ver. Pet. Ex. S). The Board of Trustees notified petitioner on December 8, 2004, that it concurred with the Medical Board and that his application for ADR and the Police

Commissioner's application for ODR were both denied (Ver. Pet. Ex. T).

Petitioner commenced an Article 78 proceeding arguing that the respondents' decision was arbitrary and capricious. By decision, order, and judgment of December 19, 2005, this court granted the petition to the extent that the matter was remanded to the Medical Board in order for it to "consider and articulate a rationale as to why the findings of petitioner's doctors that he is disabled are not supported by the objective testing of plaintiff's condition" (Ver. Pet. Ex. V, Decision, Order, Judgment, Dec.19, 2005, p. 10 [Feinman, J.]). This court's decision stated in part that

the Board's conclusions appear in total contradiction to the evidence. It may be that the Board's rational[e] is not fully articulated. It would appear, for example, that petitioner's knee surgery, conducted after his retirement, which repaired a grade III chondromalacia and a synovial tear, is evidence that he had previously suffered from a disabling condition, surgically corrected, although petitioner continues to complain of pain and weakness. It is not clear whether the Board believes that post-surgery, the knee is now able to handle normal police work activities. Similarly, the Medical Board notes without comment the statements by Dr. McMurtry that petitioner is "an excellent candidate for decompressive surgery" in his back, and the petitioner's statement that surgery has been suggested []. It is unclear if respondents are suggesting that because petitioner has been unwilling to undergo surgery, this indicates that he is not disabled (see, Resp. Memo of Law at 11), and if they believe that he should undergo the surgery, then it is not clear how he could not be classified as other than unable to perform the duties of a police officer and therefore disabled. It may be that the Medical Board only needs to offer a more complete explanation for its conclusions. As they now stand, however, the conclusions appear arbitrary and capricious and not based on the credible objective testing of plaintiff's condition.

(Ver. Pet. Ex. V, Decision, Order, Judgment, Dec.19, 2005, pp. 9-10 [Feinman, J.]).

On September 20, 2006, the Medical Board issued its memorandum response to the court's directive (Ver. Pet. Ex. W [Board Opinion]). It summed up and reaffirmed its previous work by noting that it had found "a lack of objective orthopedic evidence demonstrating a

disability,” based in particular on its examination of the patient in January 2004, and the contents of two neurosurgeon reports from April 2001 and June 2002 (Board Opinion ¶ 14). It explained first that any evaluation consists of “*subjective complaints*,” which are what the patient describes, and includes “pain, numbness and the distribution of discomfort”; “*objective findings on examination*,” which include the reflexes and signs of atrophy, all of which are uncontrolled by either the examiner or the examinee; “*laboratory data*,” including MRI and CT scans, which are “subject to interpretation which may vary from physician to physician”; “*history*,” and “*other physicians’ examinations*.” (Board Opinion ¶¶ 6-7, 9-10). It further noted that a patient “can control many aspects of the examination,” including the range of motion, gait, and ability to do various tests such as heel and toe walking, and squatting (Board Opinion ¶ 8).

The Medical Board described its “objective findings” made in January 2004 when it examined petitioner. It points out that the examination revealed “a normal gait,¹ no spasm, a motor strength of 5/5, deep tendon reflexes to be equal and symmetric and a straight leg raise to 90° bilaterally.” Petitioner “was able to flex his knees to 110°. He could fully extend [his knees]. No atrophy was present. There was no patellar maltracking. Grind was negative.” He had a “negative” anterior drawer, Lachman test result, and McMurray sign, all of which indicated a lack of “significant meniscal pathology” or varus or valgus insufficiency. There were no signs of inflammation, such as swelling or excessive heat. “These all suggest that there was no instability of the knee,” and that there was a “functional” range of motion with no evidence of meniscal pathology.” Left out of the Medical Board’s recitation of its findings in 2004 were the

¹“Gait,” however, was described by the Medical Board as one of the aspects of the examination that can be controlled by the patient.

“subjective findings,” namely that petitioner declined to do certain tests because of concerns of imbalance, or fear of pain, and that he complained of pain and tenderness (see, Ver. Pet. Ex. O ¶ 8). At that time, the Medical Board noted that, “[t]here is pain out of proportion to stimulus in both buttocks and also tenderness on both sacroiliac joint [sic].” (Ver. Pet. Ex. O ¶ 8).

The Board Opinion highlights Dr. McMurtry’s report of April 16, 2001, as discussing “in great detail” a decompressive surgery that would alleviate petitioner’s “type of symptoms” which McMurtry believed were caused by lateral root stenosis (Board Opinion ¶ 12). Not highlighted was McMurtry’s findings upon physical examination of point tenderness at L5, no sciatic notch tenderness, no pain on rotation and range of motion, no atrophy or fasciculations, but positive straight leg raising at 45 degrees bilaterally, and a “slightly diminished pin prick in both L5 distributions.” (Ver. Pet. Ex. E [McMurtry report of April 16, 2001], p. 1). The Board Opinion noted that McMurtry was the only doctor out of all those who examined petitioner, who found an absent left ankle reflex, and noted that this is not a condition that comes and goes (Board Opinion ¶ 12). The Board also noted that the finding of total leg numbness was inconsistent with an organic pathology (Board Opinion ¶ 12).

The Board Opinion also highlights the June 27, 2002 examination by Dr. Karlan, as finding no weakness of any muscle group in the arms or legs, active and equal reflexes, no Babinski’s sign, a decreased pin in the lower left leg but normal elsewhere. Not highlighted was Dr. Karlan’s recordings of petitioner’s statements of pain or that petitioner had “some difficulty” in getting up from the examining table and walking on heels and toes, and balancing (Ver. Pet. Ex. N). The Board Opinion noted that “this was diffuse and nondescript with regards to a dermatome,” and concludes, somewhat incoherently, that “[t]his finding is based upon his

complaints would be nonphysiologic” (Board Opinion ¶ 13).

Petitioner argues that the Medical Board has arbitrarily and capriciously chosen to overlook or ignore the laboratory data and reports and findings of other doctors who have found him physically unfit to perform his duties as a police officer, in making its determination that he is not disabled and should be denied disability retirement. He seeks another remand for the Board to fully set forth the bases for its reasons.

Respondents argue that the Medical Board has complied with the court’s previous directive, and that it sets forth the objective medical evidence as well as the findings from its own interviews and examinations of petitioner, all of which are sufficient to establish that its reasoning was based on credible evidence and should be upheld.

Legal Analysis

It is a well-settled rule that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency’s determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a decision is arbitrary or capricious is “determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). An arbitrary action is generally taken without regard to the facts (*Matter of Pell*, at 232).

It is well-settled that the Board of Trustees of the Police Pension Fund is bound by the

Medical Board's determination of disability (*Matter of Borenstein v New York City Employees Retirement Sys.*, 88 NY2d 756 [1996]). The Board's determination will not ordinarily be disturbed if the determination is based on "substantial evidence," which the Court of Appeals has held to mean, in the context of disability cases, as "some credible evidence" (*Matter of Borenstein*, 88 NY2d at 760, citations omitted). Where the medical evidence is conflicting, it is the sole province of the Medical Board to resolve the conflict (*Matter of Borenstein*, at 760). Reviewing courts may not weigh the medical evidence or substitute their judgment for that of the Medical Board (*Matter of Borenstein*, at 760).

Here, the Medical Board explains, in essence, that its determination was and is based on its physical examinations of petitioner, as well as the findings of various objective tests as described by certain physicians. Based on the Board Opinion of September 2006, it can be deduced that the Medical Board chose to give no credence to petitioner's subjective complaints. It also apparently did not agree with the reports of other physicians, such as the orthopedist, Dr. Carr, who wrote on July 10, 2001, that petitioner's "substantial chronic and gradually progressive chronic structural changes" in his back, with "radiculopathic compromise to both" legs, and the "chronic derangement" and "instability" of both knees, were all directly related to job-related accidents and are "obviously chronic/permanent in nature and incompatible with the performance of a police officer." (Ver. Pet. Ex. F, Carr report of July 10, 2001, at 13). Nor did it apparently find persuasive other doctors' interpretations of laboratory data, such as the physiatrist who reported that the January 2002 nerve conduction and electromyography studies were consistent with an old and chronic bilateral L5-S1 radiculopathy and with chronic spinal stenosis at the lumbo-sacral area (Pet. Ex. I), or with the radiologist who reported in May 2002 that a second

MRI of petitioner's lumbar spine, when compared with a December 2000 film, showed a progressive herniation at L4-L5 with increased central and neural foraminal stenosis, and an unchanged herniation at L5-S1 and disc bulges at L3-L4, both producing lateral stenosis (Pet. Ex. M).

Although not reviewed again in September 2006, in previous determinations by the Medical Board, it had noted the MRI in December 2000 of petitioner's knee which showed two tears in the meniscus and a partial tear in the anterior cruciate ligament, that arthroscopic surgery was performed in April 2002 which found a compression tear of the medial meniscus, a small tear of the synovial covering of the anterior cruciate ligament, and a grade III chondromalacia of the patella, and that the April 2004 MRI of his left knee showed only a tiny radial tear in the body of the medial meniscus, but no other tears, and a grossly intact anterior cruciate ligament, a healed sprain, and thinning of the patellar articular cartilage. Although not specifically commenting on the apparent success of the surgery, the Board Opinion states that in its view, the chondromalacia was not clinically significant (Board Opinion ¶ 11).

Petitioner's argument that the matter must again be remanded for a more explicit detailing of the Medical Board's review of the evidence, is unpersuasive. The court is constrained by the statutory framework to determine only whether the Medical Board has made its determination based on some credible evidence (*Matter of Borenstein*, at 761; *Matter of Campazzi v Ward*, 181 AD2d 431 [1st Dept. 1992]). Here, where the Board has explained the types and quality of evidence that it reviews, and has set forth its findings based on the objective evidence, its determination that petitioner is not disabled, although not in agreement with several of petitioner's doctors, should not be questioned or interfered with by this court (*see, Matter of*


Cammarota v Teachers' Retirement Sys., 205 AD2d 412, 412 [1st Dept. 1994]). As noted above, it is solely within the Medical Board's province to resolve conflicts between medical opinions (*Matter of D'Angelo v Ward*, 159 AD2d 425, 426 [1st Dept. 1990]). The Board of Trustees is entitled to rely on its Medical Board's evaluation and expertise (*Matter of Yalon v New York City Empl. Retirement Sys.*, 180 AD2d 516, 517 [1st Dept. 1992]). It is not for this court to substitute what it might have done were it the reviewer of petitioner's medical records. Rather, the court's role is limited to determining whether the Medical Board had some credible evidence to make its determination that petitioner is not orthopedically disabled. In as much there was some such evidence, respondents' determination was neither arbitrary nor capricious. Accordingly, the petition must be denied. It is therefore,

ADJUDGED and ORDERED that the petition is denied and the proceeding is dismissed.

This is the decision, order and judgment of this court.

Dated: April 1, 2008
New York, New York

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).