

Matter of Desiano v Kelly

2008 NY Slip Op 31107(U)

April 8, 2008

Supreme Court, New York County

Docket Number: 0109461/2007

Judge: Paul G. Feinman

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

PAUL G. FEINMAN

PRESENT

PART 52

Index Number : 109461/2007
DESIANO, DONNA
vs
KELLY, RAYMOND
Sequence Number : 001
ARTICLE 78

INDEX NO. 109461/07
MOTION DATE 1-16-08
MOTION SEQ. NO. 801
MOTION CAL. NO. 6

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

Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1, 2, 3
4, 5, 6

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 1415).

Dated: 4/8/08 _____ *JMF* _____
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

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

-----X

In the Matter of the Application of
DONNA DESIANO,

Petitioner,

Index Number

109461/2007

Mot. Seq. No.

001

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

- against -

**DECISION, ORDER AND
JUDGMENT**

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, NEW YORK CITY POLICE
DEPARTMENT and THE CITY OF NEW YORK

Respondents.

For the Petitioner:

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UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served by the County Clerk
obtain entry, essential or otherwise, unless the County Clerk
appear in person at the County Clerk's Office (Room
1415).

Papers considered in review of this petition to annul:

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	1
Amended Verified Petition.....	2
Petitioner's Memo of Law.....	3
Verified Answer to Petition & Amended Petition	4
Respondents' Memo of Law.....	5
Petitioner's Reply Memo of Law.....	6

PAUL G. FEINMAN, J.:

In this Article 78 proceeding, petitioner seeks annulment a determination denying her a
line of duty accident disability retirement. For the reasons which follow, the petition is denied
and the proceeding is dismissed.

Background

Petitioner was a member of the New York Police Department from 1993 until her retirement in April 2002 (Ver. Pet. ¶ 4; Ver. Ans. ¶ 26). Petitioner suffered several line of duty injuries over the years, according to her medical folder, including neck injuries, scratches, bruises, and cuts, and repeated injuries to her left shoulder and arm, and head, neck, and back acquired in struggles variously with a prisoner, an emotionally disturbed person, and a perpetrator (see Ver. Ans. Exh. 2-7). In addition, beginning in July 1994 and occurring thereafter for the next six years, petitioner claims she was the subject of harassment by members of the department and as a result, had to seek psychological treatment (Amended. Pet. ¶ 4).

On March 14, 2002, petitioner filed an application for Accident Disability Retirement (ADR), claiming that as a result of line of duty injuries, she has constant pain in her head, neck, left shoulder and arm pain, occasional loss of feeling in her left arm and hand, and also suffers from fibromyalgia caused by the injuries (Pet. Exh. A). The Police Commissioner filed an application for Ordinary Retirement Disability on her behalf (Ver. Ans. ¶ 11; Exh. 10).

On March 29, 2002, petitioner filed a second application for ADR based on her depression and stress-related condition that resulted from the harassment (Pet. Exh. B). She also filed an application for Ordinary Disability Retirement (ODR) based on sleep apnea, fibromyalgia, and ulcerative colitis (Pet. Exh. B).

On February 28, 2003, the Police Pension Fund Medical Board considered petitioner's March 14, 2002 application, the medical records, and the results of its physical examination (Ver. Ans. Exh. 10). The Board members noted her various orthopedic injuries, and focused in particular on the neck injury of January 1, 1996. The treating doctors were in disagreement as to whether petitioner had suffered a cervical spine fracture; the Board noted the various diagnoses

and conclusions, as well as that by April 16, 1996, according to her treating doctor, petitioner had regained an excellent range of motion in her cervical spine, had no pain, and was completely intact neurologically. The Board noted petitioner's complaints of multiple joint aches and pains in conjunction with gastrointestinal symptoms which petitioner has had since she was 19 years old. It noted that petitioner's rheumatologist did a work-up and ultimately concluded that her symptoms were probably arthritis related to the ulcerative colitis, and put her on steroids to control the GI disease. The Board's physical examination of petitioner noted complaints of pain but except for "excessive lordosis in the lumbar spine" and "significant obesity," and "significant cogwheeling through her strength testing as well as her range of motion testing," the examination was within normal limits. Its review of the CT scan revealed minimal rotation at the C1-2 level but "no frank instability." The Board found no "significant objective findings" that would preclude petitioner from performing a full range of duties, and recommended disapproval of her application for ADR and the Police Commissioner's application for ODR based on fibromyalgia and pain from her previous injuries.

The Medical Board also reviewed, on the same date of February 28, 2003, petitioner's second set of applications for ADR based on her psychological condition and her application for ODR based on sleep apnea, fibromyalgia, and ulcerative colitis (Ver. Ans. Exh. 19). As to the ODR application, the Board noted petitioner's history of her GI problem that began when she was about 19 was "very vague" and "rather incomplete." It concluded that the etiology of the GI problem was "unclear," but that the psychiatric evaluation "override[s]" any findings as concerns the GI studies. Its psychological examination found that petitioner evidenced "illogical thinking," that her "mood was depressed," she had a restricted affect and was "at times

inappropriate” such as appearing ready to cry but then laughing instead. It noted that in describing the history of harassment, she did not evince two symptoms that would have been present if she had a post-traumatic stress disorder, namely a startle reaction or a fear of going into the area where she was harassed. It noted petitioner’s description of her sleep apnea and that she felt depressed and had seen a psychologist for several years and then changed therapists. The Board reviewed the one report submitted, written in September 2002 by a psychologist who had seen petitioner for about four and a half months, which described petitioner’s anger and diagnosed her with post-traumatic stress disorder, generalized anxiety disorder, and adjustment disorder with mixed emotional features. The Board’s mental status evaluation however, did not find an anxiety or adjustment disorder but an apparent depressive disorder, based on her feelings of helplessness, and concluded that her sleep problems, irritable bowel, and fibromyalgia “are symptoms on a conversion basis due to her depressive disorder.” The Board approved her ODR application for sleep apnea, colitis, and fibromyalgia, and disapproved her ADR application based on a psychological disorder.

The Executive Director of the Police Pension Fund remanded petitioner’s application on June 16, 2003, based on the submission of a May 12, 2003 evaluative report by a mental health worker (Ver. Ans. Exh. 21, 23). The report was a DSM IV Multiaxial evaluation which noted and several specific signs and symptoms including poor memory, appetite changes, feelings of worthlessness, etc., and concluded that petitioner has an adjustment disorder with mixed features including post traumatic stress disorder; sleep apnea, ulcerative colitis; fibromyalgia, and asthma (Ver. Ans. Exh. 23).

On July 22, 2005, the Board reevaluated petitioner’s application (Ver. Ans. Exh. 22). It

noted (without mentioning that it had granted ODR based on sleep apnea, ulcerative colitis, and fibromyalgia), that it had previously recommended denial of petitioner's ADR application and the police commissioner's ODR application (Ver. Ans. Ex. 22 ¶ 2).¹ After addressing the contents of the DSM IV Multiaxial evaluation, it then described its physical examination of petitioner which found a mild decrease in her neck rotation to the right, and mild tenderness in both trapezius muscles which petitioner said was caused by her fibromyalgia. The Board concluded that orthopedically, she was able to work, that her inflammatory arthritis consistent with inflammatory GI disease appeared to be in "full remission," that sleep apnea would not prevent her from working, and her colitis "appears to be under good control with re-current medications." However, the Board concluded, after examining petitioner's mental condition, that she suffers from a "severe psychiatric disorder that prevents her from performing the full duties of a police officer," and that she needs medication and psychiatric care for an unknown period of time. It noted that she has symptoms of a major depressive disorder and that her antidepressant has not relieved her symptoms; she is highly irritable and angry; obsessed with thoughts of the police officer who harassed her, and feels that he is stalking her everywhere she goes; and suffers nightmares.

The Board concluded that all of the evidence showed that "there were significant objective findings precluding [petitioner] from performing the full duties of a New York City Police Officer." (Ver. Ans. Ex. 22, Med. Bd. Rep. of 7/22/05 ¶ 10). It accordingly rescinded its

¹Based on this description, the Medical Board is referring to its February 28, 2003 recommendation concerning petitioner's March 14, 2002, application for ADR based on her disabling pain and fibromyalgia caused by her previous line of duty injuries.

previous decision and recommended approval of her application for ODR but not her application for ADR, based on a diagnosis of Histrionic Personality Disorder, Somatization Disorder, and Depressive Disorder, NOS. At some point thereafter, the Board “re-dictated” this concluding paragraph, so that the “final” version of the July 22, 2005 report states that petitioner “was suffering from symptoms of a severe psychiatric disorder that prevent her from performing the full duties of a New York City Police Officer (Ver. Ans. Ex. 22, Med. Bd. Rep. of 7/22/05 ¶ 11).² It further states that there is a “reaffirmation of the presence of a severe depressive disorder that has disabled her for several years and that requires medication and psychiatric care for an unknown period to come.” The final diagnosis is: Histrionic Personality Disorder, Somatization Disorder, Chronic Depressive Disorder, and Depressive Disorder, NOS. It reaffirmed its disapproval of both petitioner’s March 14, 2002 application for ADR (orthopedic) and the Police Commissioner’s application for ODR (orthopedic).

On March 14, 2007, the Board of Trustees determined, pursuant to the Medical Board’s recommendations, that petitioner should receive ODR based on psychiatric disability but not ADR, and that the applications for ADR and ODR based on her orthopedic conditions should both be denied (Ver. Ans. Exh. 25).

Petitioner timely commenced this proceeding, seeking Article 78 relief. She argues that the Medical Board arbitrarily and capriciously failed to set forth its conclusions as to why it did not believe that her psychological condition was the result of the years of sexual harassment she had undergone. In her reply papers, she also argues that the Board arbitrarily withdrew its

²Petitioner had only the first version of the report, and not the amended, “re-dictated” version with the additional paragraph (*cf.*, Ver. Pet. Exh. 5; Ver. Ans. Ex. 22).

diagnosis of fibromyalgia when it determined in July 2005 that the diagnosis was based on her psychological condition. She also argues that the Medical Board failed to consider whether there was a link between petitioner's line of duty injuries and her fibromyalgia, and thus ignored the rule that where a line of duty injury exacerbates a pre-existing condition to the point of disability, the application is entitled to ADR.

Respondents argue that the determination that petitioner is not physically disabled is supported by credible medical evidence. They further argue that the psychiatric condition was not caused by an accident, and that therefore petitioner cannot seek ADR based on her psychiatric condition. They also argue that a claim that physical injuries became permanently disabling after her retirement must be disallowed.

Legal Analysis

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).

In order to receive accidental disability retirement pension benefits, the petitioner must prove that her disability was caused by a line-of duty accident (*see, Matter of Baird v Kelly*, 25

AD3d 311, 313 [1st Dept. 2006]). The alleged ongoing harassment endured by petitioner was purposeful, rather than an accidental occurrence; therefore even if she suffers from depression or other debilitating emotional conditions because of work-related activity, there was no “accident” that caused her condition or that qualifies her for ADR within the meaning of the statute (*Matter of Baird v Kelly*, 25 AD3d at 313, citing *Matter of Lichtenstein v Board of Trustees of Police Pension Fund*, 57 NY2d 1010, 1012 [1982]). Specifically, sexual harassment by fellow officers or supervisors has been held not to be an “accident” for purposes of qualifying for ADR (*Matter of Baird v Kelly* at 313; NYC Admin. Code. § 13-252). Thus, the Board of Trustees properly found, based on the credible evidence adduced by the Medical Board, that petitioner was disabled from service based on her psychiatric condition and should receive ODR benefits.

Petitioner’s arguments as to the Medical Board not considering or addressing whether her fibromyalgia was caused by her line of duty injuries, and that the Board arbitrarily withdrew its diagnosis of fibromyalgia are raised only in her reply papers. Claims raised for the first time on reply may not be entertained by the court (*Leeds v Lenox Hill Hosp.*, 6 AD3d 232, 234 [1st Dept. 2004]).

The Medical Board’s recommendation and the Board of Trustee’s determination that petitioner is disabled and entitled to ODR is based on credible evidence and was arrived at after considering the totality of petitioner’s application. Accordingly, it is

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

This shall constitute the decision, order and judgment of this court.

ENTER:

Paul H. Quinn

J.S.C.

Dated: April 8, 2008
New York, 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 1419).