

<b>Matter of Garcia v Kelly</b>
2008 NY Slip Op 31112(U)
March 25, 2008
Supreme Court, New York County
Docket Number: 0113578/2005
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN**  
*Justice*

PART 57

*Matter of Angelo Garcia*

INDEX NO. 113578/05

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

- v -  
*Raymond W. Kelly*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Article 78

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2, 2A  
3  
M

*Memo of Law*  
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be based hereon. To obtain entry, a copy of this judgment must be filed in person at the Assignment Clerk's Desk (Room 4144).

Dated: 3-25-08  
**MARCY S. FRIEDMAN**

*[Signature]*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

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

In the Matter of the Application of  
ANGELO GARCIA,  
*Petitioner,*

Index No.: 113578/05

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

- *against* -

DECISION/ORDER

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

*Respondents.*

**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**  
**1417)**

Present: HON. MARCY FRIEDMAN  
Justice, Supreme Court

In this Article 78 proceeding, petitioner Angelo Garcia, a retired police officer, seeks to annul a decision of respondent Board of Trustees of the Police Pension Fund, dated April 13, 2005, approving the recommendation of the Medical Board Police Pension Fund, Article II ("Medical Board"), dated December 1, 2004, which granted petitioner ordinary disability retirement and denied petitioner's application for accident disability retirement benefits. Petitioner claims that, as the result of several line of duty accidents, he became disabled from full duty police work and is entitled to accident disability retirement benefits ("ADR"). Petitioner now moves to restore the proceeding, to vacate the determination denying him ADR, and to remand the matter for further consideration of evidence. The branch of the motion which seeks to restore the proceeding was granted by prior order of the court (Goodman, J.), dated June 1, 2007.

Petitioner served as a police officer with the New York Police Department from 1961 until his retirement in 1995. In January 1991, petitioner applied for ADR on the basis that he

was disabled as the result of three line of duty accidents: a motor vehicle accident in November 1982, another motor vehicle accident in April 1985, and an office accident in April 1986.

Petitioner was also injured as a result of an off-duty motor vehicle accident in September 1990.

Petitioner never returned to full duty after the September 1990 accident.

After petitioner applied for ADR, in November 1991, respondent Police Commissioner applied on petitioner's behalf for ordinary disability retirement benefits ("ODR"). In December 1991, the Medical Board examined petitioner and reviewed medical records in connection with petitioner's injuries and subsequent treatment. The Medical Board concluded that there was no causal relationship between the line of duty accidents and petitioner's disability and recommended approval of the application for ordinary disability retirement and disapproval of the application for accident disability retirement. After remands from the Board of Trustees, the Medical Board reviewed petitioner's records, without further examining him, in May 1992 and December 1994, and reiterated its prior recommendation of ODR. In March 1995, the Board of Trustees accepted the Board's recommendation and retired petitioner with ODR. Petitioner then commenced an Article 78 challenging the denial of ADR. By decision and order dated March 1, 1996 (Collazo, J.), the petition was granted to the extent of remanding the matter to the Medical Board for further consideration "due to the alleged failure to notify and examine petitioner, including the consideration of any aggravation of injury." (Decision at 9.) The order directed that further proceedings "include consideration of all Petitioner's records, submissions and physical condition in accordance with all governing statutes." (*Id.* at 10.)

Following the judicial remand in March 1996, the Medical Board did not review petitioner's application until February 2004, at which time the Board reaffirmed its 1994

recommendation to approve ODR and disapprove ADR. On December 1, 2004, after the Board of Trustees remanded petitioner's application, the Medical Board interviewed petitioner and reviewed medical records, including a report from Dr. Memoli, an orthopedic surgeon, dated August 9, 2004. The Medical Board then reaffirmed its prior decision approving ODR and disapproving ADR. On April 13, 2005, the Board of Trustees denied petitioner's application for accident disability retirement.

Petitioner commenced the instant proceeding in September 2005, again seeking to annul the Medical Board's determination denying ADR. By stipulation dated November 1, 2005, the parties agreed that the matter "will be remanded to the Police Pension Fund for further review." The stipulation also marked the Article 78 proceeding "off the calendar without prejudice to renew." (Stipulation, Ex. B to Petitioner's Affidavit in Support.) By memorandum dated November 3, 2005, respondent's counsel notified the Board of Trustees of the Article 78 proceeding, noting that the Medical Board had omitted the August 9, 2004 report by Dr. Memoli, and stating that "[i]n light of the Court's directive that the Medical Board review all the submissions by Petitioner, it is our recommendation that the Board of Trustees remand Petitioner's application to the Medical Board for further review, with that review to include Dr. Memoli's report dated August 9, 2004." (Memorandum, Ex. I to Petitioner's Affidavit in Support.) On November 9, 2005, the Board of Trustees remanded petitioner's application to the Medical Board, "as per memorandum from the Law Department." (Memo from Executive Director, Police Pension Fund, Ex. 30 to Verified Answer.) The Medical Board responded to the remand on January 11, 2006, noting that at its December 1, 2004 meeting, it had in fact considered and commented upon Dr. Memoli's August 9, 2004 report, and that it "feels that it

has adequately answered the court's remand based upon the minutes of December 1, 2004." (Jan. 11, 2006 Memo, Ex.31 to Verified Answer.) The Medical Board then reaffirmed its previous decision. On June 14, 2006, the Board of Trustees denied petitioner's ADR application by tie vote.

Petitioner argues that the June 14, 2006 determination of the Board of Trustees must be vacated and the matter must be remanded because respondent failed, on the prior remand, to consider all of petitioner's medical records, including an April 21, 2005 report by Dr. Memoli. Respondent argues that petitioner is not entitled to consideration of Dr. Memoli's April 21, 2005 report because it post-dates the April 13, 2005 determination by the Board of Trustees that is being challenged.

Respondent correctly argues that, in reviewing an administrative determination under Article 78, a court may not consider evidence that was not in the record before the agency, and that this court therefore may not consider the April 21, 2005 Memoli report. (See Featherstone v Franco, 95 NY2d 550 [2000].) However, this argument ignores that petitioner seeks review of the report not by the court but by the Board of Trustees. To the extent that respondent further argues that the Board itself may not consider the report, that argument is without merit.

Ordinarily, whether the agency should reopen proceedings to consider additional evidence would not be a matter for judicial determination in an Article 78 proceeding. (See Matter of Rocco v Board of Trustees, 98 AD2d 609 [1st Dept 1983], appeal dismissed 62 NY2d 803 [1984]; Matter of Barnes v Board of Trustees, 28 AD3d 655 [2d Dept 2006].) Here, however, in November 1, 2005 stipulation settling the instant proceeding, the parties expressly stipulated to a remand to the Board for consideration of additional evidence.

\* 6 ]

Respondent does not argue that the stipulation was ambiguous as to the evidence to be considered on the remand but, instead, ignores the stipulation. In any event, the determination of whether a contract is ambiguous is one of law to be resolved by the court (Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548 [1995]; W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157 [1990]), and this court does not find that the stipulation was ambiguous. It does not on its face limit the evidence to be considered on the remand. The court notes, moreover, that the Article 78 petition that the stipulation settled expressly relied on the April 21, 2005 Memoli report in seeking reversal of the Board's denial of ADR. It thus appears that while the stipulation did not restrict the scope of the remand, respondent's counsel, in its November 3, 2005 memorandum to the Board, mistakenly limited the scope of the remand to the August 9, 2004 Memoli report that the Board had in fact previously considered.

Finally, respondent argues that Dr. Memoli's August 9, 2004 report opined that a cervical condition was the cause of his disability and that the April 21, 2005 report for the first time advances "an entirely new diagnosis" that a low back injury was also a disabling condition. (Respondent's Memo. In Opp. at 9.) Respondent contends that the 2005 report should also be rejected for this reason. The court holds that it is for the Board to determine whether this new diagnosis should be credited under these circumstances in which the parties stipulated to an unrestricted remand.

In view of the parties' stipulation, the matter will be remanded for the Board to consider the evidence previously submitted to the Board by petitioner and respondent, as well as the April 21, 2005 Memoli report. Nothing in this decision shall be construed as requiring the Board to consider any new evidence other than the April 21, 2005 Memoli report.

It is accordingly ORDERED that the petition is granted to the extent of remanding the matter to respondent for further proceedings and the issuance of a determination consistent with this decision. In the event petitioner seeks review of the Board of Trustees' determination on the remand, a new Article 78 proceeding shall be commenced.

This constitutes the decision and judgment of the court.

Dated: New York, New York  
March 25, 2008

  
MARCY FRIEDMAN, 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 1418).**