

Matter of James v Kelly
2008 NY Slip Op 31859(U)
June 30, 2008
Supreme Court, New York County
Docket Number: 0113736/2007
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN

Justice

PART 52

James, T

INDEX NO. 113736107

MOTION DATE 4-16-08

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Kelly R

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3-4

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
E-File certificate requesting Entry of Judgment with a copy
of the order and/or judgment attached.

Dated: 6-30-2008

JAF

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
COUNTY OF NEW YORK: CIVIL TERM : PART 52

-----X

In the Matter of the Application of
THOMAS JAMES,

Petitioner,

Index Number 113736/2007
Submission Date April 16, 2008
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, THE BOARD OF TRUSTEES of the
Police Pension Fund, Article II, NEW YORK CITY
POLICE DEPARTMENT, and THE CITY OF
NEW YORK,

Respondents.

-----X

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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>
Answer, Memo of Laws.....	<u>3,4</u>
Reply Memo of Laws.....	<u>5</u>

PAUL G. FEINMAN, J.:

In this Article 78 proceeding, petitioner seeks to remand the determination by respondents to deny him an accident disability retirement allowance pursuant to CPLR 7803 (3). For the reasons which follow, the petition is denied.

Petitioner was appointed as a uniformed police officer with the New York City Police

Department in August 1970. In 1978, he underwent surgery to replace his right ear drum; in 1980, an otological examination revealed a right ear conductive hearing loss, with a 20 decibel air bone gap, and a severe high-frequency sensori-neural hearing loss “characteristic of noise induced hearing loss.” (Pet. Ex. G [Leinhardt Rep. 5/1/80]). On May 14, 2002, while on duty at police headquarters, assigned to the alarm board which was testing the alarm system, he complained of dizziness, ringing in his ears, loss of balance, and loss of hearing in both ears, and was taken to a hospital emergency room (Pet. Ex. B [Line of Duty Injury Rep.]). He was diagnosed with tinnitus and directed to rest (Pet. Ex. B [Aftercare Instructions]). In June 2002, he underwent audiometric tests and a CT scan of his temporal bones (Pet. Ex. C, D). According to Dr. Moshe Ephrat, an otolaryngologist, the audiometric tests showed “significant right-sided mixed moderate to severe hearing loss.” (Pet. Ex. E [Ephrat Rep. 10/20/2002]). The neuroradiologist who read the CT scan found that his left ear structure was normal, but his right ear structure had some soft tissue thickening possibly the result of an inflammatory process (Pet. Ex. D).

Petitioner applied for Accident Disability Retirement (ADR) benefits on August 13, 2002, based on this line of duty injury (Ans. Ex. 7). The Police Commissioner applied on petitioner’s behalf for Ordinary Disability Retirement (ODR) benefits. Both applications were ultimately denied by the Board of Trustees of the Police Pension Fund Article II. Petitioner brought an Article 78 proceeding seeking review of the denial. By decision, order, and judgment of February 15, 2006, this court granted his petition to the extent of remanding the proceeding to respondents’ Medical Board for a *de novo* hearing and an examination by a doctor with specific training in hearing-related issues (Pet. Ex. K; Tr. of Dec., pp. 5:24-26; 9:17-20).

Petitioner appeared before the Medical Board Police Pension Fund Article II on September 6, 2006, and, after a deferral for administrative clarification, the Medical Board issued its new decision, which explained would “clarify its position with regard to disapproval of the officer’s application for disability retirement, based upon this order of the court.” (Pet. Ex. M [Med. Bd. Dec. 10/25/06, ¶¶ 1, 2]). This decision was later adopted by the Board of Trustees on June 13, 2006, after tabling the matter for three months following receipt of a request for another remand by plaintiff’s counsel on June 13, 2006 (Pet. Ex. O).¹

Petitioner timely filed the instant Article 78 proceeding, again seeking remand and reversal of respondents’ decision denying him any disability retirement benefits. He argues that respondents contravened the court order by not undertaking an examination by a hearing specialist. He also argues that because the Medical Board’s decision was not informed by the expertise of a hearing specialist, and because the Board of Trustees tabled the case for three

¹Petitioner’s attorney submitted a 2007 report from petitioner’s otorhinolaryngologist, Dr. Leinhardt, who opined that “despite [petitioner’s] prior history,” the events on May 12, 2002, were “most likely the proximate cause of [petitioner’s] current complaint of Tinnutius [sic], further nerve damage, and hearing loss”; in the doctor’s opinion, petitioner qualifies for at least ODR benefits, and “it would at least behoove the board to obtain an independent medical evaluation by a certified audiologist or otolaryngologist” to help the Board in its determination (Pet. Ex. N). The Trustees agreed to table the matter in April 2007 for further examination (Ans. Ex. 26 [Bd. of Trustees Minutes 4/11/2007]). At its May 2007 meeting, the Trustees again tabled decision, so as to “discuss alternatives,” finding that the Medical Board had done a careful review of the court’s concerns and addressed new documentation, and that there was “no value” in granting an additional remand (Ans. Ex. 27 [Bd. of Trustees Minutes 5/9/2007]). At its June 13, 2007, meeting the Board of Trustees, after twice going “off the record” to discuss the case, finally denied the remand request, and adopted the October 2006 decision by the Medical Board that denied petitioner any retirement benefits, with one Trustee noting that there “is no requirement under the law that the Medical Board send the disability applicant to an outside consultant or professional for any particular matter” (Pet. Ex. O [Bd. of Trustees Minutes 6/13/2007]).

months, denied his request for a remand to present the Medical Board with the March 12, 2007 report by Dr. Leinhardt, and failed to make a complete record of its June 13, 2007 decision-making, their final decision to deny him any disability retirement was based on legally insufficient evidence and was arbitrary and capricious, made without a full appraisal of the facts in the law.

Respondents argue that petitioner has failed to establish that he is physically incapacitated from performing his duties or that his incapacity is the natural and proximate result of a line of duty injury, and that there was ample credible evidence found by Medical Board to support its decision that petitioner's hearing loss was insufficient to incapacitate him from performance of his job as a member of the police force.

Where a petitioner a member of the City pension fund and retirement system, his or her application for accidental disability retirement involves first, a finding by a three-physician member pension fund Medical Board that, based upon a medical examination and after investigating all essential information in connection with the application for a disability retirement application, the member is disabled for performance of duty and ought to be retired, and secondly, that the disability is "a natural and proximate result of an accidental injury received in such city-service"; this determination is then sent to the Board of Trustees (*Matter of Meyer v Board of Trustees of NYC Fire Dept.*, 90 NY2d 139, 144 [1997], citing among others *Matter of Canfora v Board of Trustees*, 60 NY2d 347, 351 [1983] [construing comparable provisions governing New York City Police Pension Fund]).

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 an Article 78 proceeding, the petitioner has the burden of proving that he/she is physically incapacitated from performing his/her duties as a natural and substantive factor of an accidental injury received in the course of performing city service (*Matter of Evans v City of N.Y.*, 145 AD2d 361, 361 [1st Dept. 1988] [although the petitioner suffered from ulcerative colitis, a stress-related disease, this condition was not an accident]). This court's February 2006 decision to remand the proceeding for a new hearing and examination by an expert, was based on the court's concern that petitioner presented evidence of a disabling hearing loss, but there was no discussion in the Medical Board's report as to whether the hearing loss was caused or exacerbated by the May 14, 2002 event, or whether his hearing loss was degenerative in nature; nor was there an explanation of why the Board did not credit the reports of Dr. Richard Leinhardt, petitioner's otolaryngologist, as to the petitioner's post-incident hearing loss and its causation (Pet. Ex. K, Dec. & Order. Tr. pp. 6, 8).

Here, the Medical Board explicitly chose to "clarify its position," rather than engage an expert to advise the three-panel board. In its decision of October 25, 2006, the Board noted that more recent audiological examinations conducted by Alan Richards, Ph.D, of Madison

Audiology Associates, found that petitioner's left ear had an abnormal tympanogram, with borderline to normal hearing, although at higher frequencies, there is "mild to moderate decline in sensitivity" (Pet. Ex. M, Med. Bd. Dec. 10/25/2006 ¶ 3; Pet. Ex. I [Madison Audiology Assoc. Report of 9/18/2004]). It agreed that there is right ear hearing loss, with tests showing a mild mixed loss at lower frequencies, primarily of a conductive nature, and a moderate decline in sensitivity at higher frequencies, but with good speech discrimination, although with an abnormal tympanogram (Pet. Ex. M, Med. Bd. Dec. 10/25/2006 ¶ 3).

The Board explained that the 1980 audiometric findings and the 2004 audiometric findings are "similar," with the findings from 2004 "slightly better" than the findings from 1980 (Pet. Ex. M, Med. Bd. Dec. 10/25/2006 ¶ 7). Its position is that petitioner worked full time between 1980 to 2002 with some hearing loss, and that his hearing loss as of 1980 was "equivalent or worse by description" than what was found in the 2004 examination findings (Pet. Ex. M, Med. Bd. Dec. 10/25/2006 ¶ 6). It notes the statement by Dr. Leinhardt in 2003 that petitioner's post-incident hearing loss would preclude him from a position on the police force, but explains that even in 1980, petitioner's hearing loss as noted by Dr. Leinhardt would have precluded him from being hired by the Police Department (Pet. Ex. M, Med. Bd. Dec. 10/25/2006 ¶ 5). Finally, the Medical Board concluded that petitioner's right ear hearing loss "had to do with" the 1978 surgery, and was not related to job exposure (Pet. Ex. M, Med. Bd. Dec. 10/25/2006 ¶ 7).

The Medical Board did not comply with the court's request that it engage a hearing specialist to examine petitioner and present findings concerning whether petitioner's current hearing loss was the result of the May 14, 2002 incident, but instead considered newer medical

findings provided by a second audiologist report of 2004, and set forth a more detailed explanation of its reasoning.² It concluded that petitioner worked with a certain amount of hearing loss for almost the entirety of his police career, that this hearing loss did not significantly increase over time, and that the hearing loss in his right ear was the result of the 1978 surgery; it did not find that the left ear hearing loss to be disabling.

The Medical Board has the duty, under law, to determine whether an applicant is incapacitated by the injury and cannot perform his or her duties (*Matter of Borenstein*, 88 NY2d at 760-761). Where the Medical Board articulates a detailed and fact-based medical explanation, even if it does not conduct its own examination of the applicant, its findings of lack of causation is sufficient credible evidence under the law (*Matter of Meyer*, 90 NY2d at 146, 152). The Medical Board is entitled to rely on its own examination and evaluation of the medical evidence, after considering the opinions of the applicant's physicians and experts (*Matter of Tobin v Steisel*, 64 NY2d 254, 258 [1985]).

Here, the Medical Board agreed that petitioner has a hearing loss, and that this hearing loss was significant enough that he would not have been hired with the condition. However, it has now sufficiently set forth detailed findings that explain its determination that petitioner was not disabled, namely that the medical evidence does not show much change in condition between 1980 and 2004, two years after the incident that caused petitioner to seek retirement. The

²It apparently did not re-interview petitioner (Pet. Ex. L [Med. Bd. Rep. 9/6/2006]; Ex. M [Med. Bd. Rep. 10/25/2006]). It interviewed petitioner in December 2004, who stated that in the last few years before his retirement, he could not hear the patrol car radio, has had difficulties hearing conversation, and has "true vertigo" about three to four times a day, for ten to fifteen seconds at a time (Ans. Ex. 13 [Med. Bd. Rep. 12/15/2004 ¶ 6]).

medical evidence explains how petitioner was able to continue working for so many years with a certain amount of hearing loss. Having sufficiently articulated a rational based reason for its findings, there is no further need to address the issue of the specialist.³ Although the Board of Trustees did not remand the matter to the Medical Board so that it could evaluate the March 12, 2007 report by Dr. Leinhardt, the court agrees with respondents that the report is a mere reiteration of previous findings, along with his opinion that petitioner should be examined by an expert and receive some sort of disability retirement, and that it was not arbitrary or capricious to disregard the request for a remand based on what is ultimately a matter of personal opinion. Furthermore, because the Board of Trustees is required to accept the disability determination of the Medical Board, as long as there is some credible evidence, the fact that the Board of Trustees' minutes show that the members went "off the record" when discussing the case, is not, in and of itself, sufficient to establish that respondents' determination was arbitrary and capricious.

For the above-stated reasons, it is

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

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

Dated: June 30, 2008
New York, New York

ENTER:

J.S.C.

³Pursuant to *Matter of Meehan v Kelly*, 50 AD3d 523 (1st Dept. 2008), the Medical Board is not required to employ an expert in any particular field to evaluate an applicant.