

Patrone v Kelly

2008 NY Slip Op 32324(U)

August 18, 2008

Supreme Court, New York County

Docket Number: 0104100/2008

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PRESENT: _____

PART 5

J.S.C.
Justice

Index Number : 104100/2008

PATRONE, MICHAEL

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

1, 2

Answering Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

AUG 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 18, 2008


EILEEN A. RAKOWER 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: PART 5

-----X
MICHAEL PATRONE,

Petitioner,

Index No.
103902/07

For Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

- against -

FILED Decision
and Order
AUG 22 2008

RAYMOND KELLY, as 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,

Mot. Seq. 001

Respondents.

-----X
HON. EILEEN A. RAKOWER:

Petitioner Michael Patrone became a police officer with the New York City Police Department in July, 1986, after successfully completing all exams and demonstrating that he was physically and mentally fit to perform a police officer's duties. On December 14, 2004, petitioner was working in his assignment with the auto larceny unit and became involved in an arrest that escalated from a foot pursuit to a shooting. During that pursuit, petitioner became separated from his partner and soon thereafter, he claims he heard gunshots and his partner screaming over the radio that he was being shot at. In fact, petitioner's partner was not shot at, but the one who fired shots. Neither he nor the perpetrator was injured in the incident. Petitioner, however, states that he suffered psychological trauma and was wracked with guilt by the fact that he had been separated from his partner. Petitioner suffered chest pains and shortness of breath, was taken to the emergency room of Booth Memorial Hospital and was admitted overnight. The incident was documented on a "Line of Duty Injury Report" which stated: "after foot pursuit for a stolen vehicle and shots fired, when the incident subsided I felt discomfort in my chest area and nervousness." Throughout

December petitioner was out of work more than he was in work, first on sick leave and then on vacation. Two weeks after the shooting incident, petitioner began experiencing panic attacks.

In January 2005, petitioner was admitted to LIJ Hillside Hospital for five days of psychiatric evaluation. He was diagnosed with anxiety, depression and insomnia and his medications included Lexapro, Xanax, Klonopin, Librium and Ativan. After his discharge, petitioner was referred to outpatient psychotherapy. A February 1, 2005 ambulatory care unit psychiatric assessment lists petitioner's "chief complaint" as "I am still having mild anxiety and insomnia." He was diagnosed with "Generalized Anxiety Disorder, Acute Stress Disorder and R/O Depressive Disorder NOS." Petitioner also began treatment with a Family practitioner, Dr. Albert J. Strojan, who stated in an undated letter that petitioner was under his care since January, 2005. The Doctor opined: "I also feel the at this time he is totally disabled and is unable to perform the duties of a New York City police officer." In September, 2005, petitioner, who had been on restricted duty at the Psychiatric Evaluation Center, returned to full duty status.

In December, 2005, the Police Department disapproved petitioner's application to designate the December, 14, 2004 psychological injury as a line of duty injury. Also in December, 2005, there was allegedly another work related incident, the nature of which is not revealed here, and petitioner was seen at both Queens Hospital Center emergency room and LIJ Hillside Hospital regarding panic attacks. Additionally, petitioner returned to restricted duty at the Psychiatric Evaluation Center.

On June 2, 2006 petitioner was admitted to Queens Hospital Center, after learning that an Office of Equal Employment Opportunity allegation made against him was substantiated and he would be disciplined by forfeiting ten vacation days. An assessment form from the Department of Psychiatry for that date lists his problems as anxiety, depression and substance abuse. Petitioner remained in Queens Hospital Center until June 5th when he asked to be discharged. The "Final Disposition and Discharge Summary" states that petitioner was provided with a list of MICA (mentally ill chemical abuse) programs and told to find one that is appropriate for him.

On June 6, 2006, petitioner was examined by Dr. Andrei-Claudian Jaeger of the Psychiatric & Addictions Recovery Services. The Doctor's evaluation, dated June 17, 2006, documented that petitioner had four major anxiety attacks since December, 2005. It stated the diagnosis as generalized anxiety disorder, acrophobia, panic

disorder, depressive disorder NOS, alcohol abuse, in remission and chronic anxiety disorder interfering with his ability to return to work. The report concludes "It appears that the work related incident may have precipitated significant psychological disability, followed by some impairment as manifested by the current psychiatric syndrome . . . Mr. Patrone does not appear psychologically totally disabled for any work and from a psychiatric point of view he can be employed in low stress sedentary capacity."

Petitioner went on "terminal leave" on July 3, 2006. On July 14, 2006, petitioner filed an application for Accident Disability Retirement benefits stating that the nature of his disability is "post traumatic stress syndrome which causes depression and anxiety and permanently prevents me from performing full duty as a police officer . . ." In response to his application, the Police Commissioner filed an application for Ordinary Disability Retirement benefits. Petitioner officially retired on August 1, 2006.

In a report dated September 27, 2006, a Police Department psychologist, Dr. Andrew Propper, Ph.D., examined petitioner and described him as "an individual with a lifelong history of anxiety and vulnerability to stress . . ." The report reveals that petitioner's primary care physician, Dr. Albert Strojan, began treating him for anxiety with the medications Lexapro and Xanax in May, 2004, some seven months prior to the shooting incident. The report recounts entries from LIJ Hillside Hospital which state that petitioner has had anxiety symptoms since he was a child but he has an inclination to minimize his chronic anxiety. The report notes that when placed on restricted duty, petitioner wants to return to full duty, he denies that he made statements to LIJ Hillside Hospital that he had childhood anxiety or that he has emotional difficulties around the Christmas holidays. Dr. Propper's report concludes, stating

If Sgt. Patrone had not retired, PES (Psychological Evaluation Section) would most likely have found him psychologically unsuitable for full duty police work, setting the stage for an application by the Department for disability retirement. However, the primary diagnosis would not have been Post Traumatic Stress Disorder. It seems that Sgt. Patrone has been experiencing intense episodes of anxiety with panic attacks since at least March, 2004, and that he has always been an anxious individual vulnerable to periods of serious anxiety in response to stressors. He had difficulty coping with his mother's death, and in fact

continues to struggle with that event. The incident when his partner fired shots clearly led to a major deterioration in his psychological functioning. It is unclear what caused his December, 2005 episode, but getting the command discipline caused another one in June 2006. His psychological condition is a chronic one, both in terms of its resistance to treatment and its longevity, pre-dating the December 2004 on-duty incident. Sgt. Patrone has been anxious and fragile for years, and the on-duty incident was only one of the stressors that led to his current situation. The best DSM IV diagnosis is Anxiety Disorder Not Otherwise Specified (300.00).

Petitioner was first examined by the Medical Board of the Police Pension Fund (Medical Board) on November 17, 2006. The Medical Board's report reiterates the information contained in the aforementioned reports and highlights the inconsistencies between petitioner's disclosures to the Department's Psychological Evaluation Section and information contained in the records of outside agencies and Doctors. The report notes that when petitioner was asked about the information that conflicted with that he disclosed to the Department regarding his anxiety disorder, petitioner denied the accuracy of the reports from hospitals and outside Doctors.

The Medical Board did its own examination of petitioner and its conclusions were consistent with those of Police Department psychologist Propper. The November report states that petitioner "gave histories that did not appear true to the histories he gave in the hospital." It notes that petitioner believed that as a result of the reports from the psychiatrists and psychologists relating to the December, 2004 shooting incident he would receive an accident disability pension. The report stated that petitioner's sense of guilt about the December, 2004 incident was great but a "study of his history reveals a person overly vulnerable to stressors." The Medical Board questioned petitioner's credibility because, despite his claim of psychological disability, he nonetheless manages the activities of daily living and is able to take care of himself. The Medical Board concluded that the December, 2004 incident was but one of many that contributed to petitioner's lifelong history of anxiety, panic and chronic depression. However, it stated, he does not have symptoms of Post Traumatic Stress Syndrome. The three Doctors who comprised the Medical Board concluded that "[i]n light of the above, the Article II Medical Board recommends approval of the police Commissioner's application for Ordinary Disability Retirement and disapproval of the sergeant's own application for Accident Disability Retirement. The final diagnosis is Personality Disorder, Not Otherwise Specified and Depressive

Disorder Comorbid with Anxiety Disorder.” The Medical Board’s recommendation was forwarded to The Board of Trustees of the Police Pension Fund.

Petitioner, by counsel, submitted to The Board of Trustees a memorandum of law, dated March 9, 2007, arguing that “the Medical Board never considered the consequence (a) of their own determination that the member suffers a psychiatric disability that was aggravated by his line of duty psychological injury and escalation of his symptoms were a consequence thereof; and (b) that the events surrounding the traumatic injury were accidental under the relevant sections of the administrative code and the retirement and disability law.” Petitioner requested that the Board of Trustees make a determination in support of petitioner’s application for accident disability and remand the matter back to the Medical Board for consideration consistent with his position. The minutes of the March 14, 2007, Board of Trustees meeting reflect that portions of the memorandum of law were read into the record and, by letter dated March 21, 2007, the matter was remanded back to the Medical Board for reevaluation “as per the verbatim minutes and new evidence.”

Petitioner had continued his therapy and the new evidence included a January 24, 2007 report by psychologist Dr. John T. McCann, Ph.D. who found that petitioner was terrified by the December, 2004 situation. The report stated that petitioner was “experiencing daily intrusive and distressing thoughts about the event, nightmares at least twice a week, frequent flashbacks in which he relives his trauma, distress when reminded of the event, loss of interest in things he used to enjoy, feeling distant and “cut off” from others affective numbing and a pessimistic view of his future.” The report concluded that petitioner suffers from “chronic post traumatic stress disorder with secondary major depressive disorder.”

On April 27, 2007, petitioner appeared again before the Medical Board. It reviewed the aforementioned reports from petitioner’s own doctor and again examined him. The Board’s report states that it reviewed the submission of Dr. McCann but noted that he is not a psychiatrist trained to evaluate and treat psychiatric conditions. Thus, the Medical Board gave little weight to Dr. McCann’s report finding instead that “[h]e gave psychological examinations which were very useful to him arriving at his conclusion, but they excluded the life history of the sergeant who from childhood has had a history of over reaction to stressors.” Upon re-examination of petitioner, the Board found that his presentation regarding the December, 2004 incident “illogical” and “[t]he fact that he had visible psychiatric symptoms for which he requested treatment appeared to be coincidental with the shooting.” The Board

summarizes its findings stating

[I]t appeared that the sergeant has circumstantial thinking in that he has needed a reason for his psychiatric symptoms. He has attempted to link the shooting to his symptoms, his need for alcohol and his depressive symptoms. His hospital records indicate a life long history, given to the hospital by his older brother, which includes a history of anxiety and depression, and melancholy. He received antidepressant and anxiety medications prior to the shooting incident. Full duty resulted at times in panic attacks. He had severe difficulties in dealing with his mother's death. He has psychotherapy with a psychologist, not a psychiatrist. His life history of interpersonal difficulties has been left out of the equation and the simplistic approach to diagnosing him has used the shooting incident as the explanation for his symptoms.

The report concludes that "the Article II Medical Board reaffirms their previous decision and recommends approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the sergeant's own application for Accident Disability Retirement."

By letter dated September 11, 2007, petitioner submitted further argument to the Board of Trustees in support of his application for Accident Disability, along with reports from Dr. Charles Rosenbloom, M.D., and another report from Dr. McCann.

Psychiatrist Dr. Rosenbloom's September 7, 2007 report reiterates the details of the December, 2004 incident in addition to reviewing petitioner's psychiatric treatment, family history and medication regime. The Doctor concludes his report by addressing what he describes as "serious errors and distortions of fact" in the Medical Board's April 27, 2007 report. Specifically, the doctor states that petitioner's presentation of the December, 2004 incident, rather than being "illogical," was "perfectly coherent, rational and logical." Dr. Rosenbloom finds that the Medical Board's conclusion that petitioner "has a need for alcohol" exaggerates his brief episode in his life, just after the December, 2004 incident, during which he "drank heavily for a total of two weeks, obviously for symptom relief." The Doctor also disputes the Medical Board's finding that petitioner has a life long history of anxiety, depression and melancholy. He states that petitioner's older brother was "flabbergasted and angry" when he heard of his supposed account of petitioner's life, instead stating that petitioner "never exhibited severe depression, melancholia, or

grossly inappropriate anxiety.” Dr. Rosenbloom’s diagnosis of petitioner was that he suffered from post traumatic stress syndrome as a result of the December, 2004 incident.

The report submitted to the Board of Trustees by Dr. McCann first takes issue with the Medical Board’s characterization of his expertise. The Doctor reviews his own credentials and affirms his recognized level of expertise. The Doctor explains that Post traumatic stress disorder is a separate diagnosis tied to a specific event and not a simplistic approach to petitioner’s diagnosis. He states that it was by objective, not subjective, tests that he arrived at this diagnosis. The Doctor’s report concludes that it is his professional opinion that “the shooting incident of December 14, 2004 was the proximate cause of [petitioner’s] disabling condition.”

By letter dated December 1, 2007, the Board of Trustees informed petitioner that his application for Accident Disability retirement was reconsidered and denied. The letter notes that petitioner requested withdrawal of the Commissioner’s application for Ordinary Disability Retirement and, therefore, his retirement status is Service Retirement. The letter further directs that should petitioner wish to challenge the denial of Accident Disability Retirement, he must file an Article 78 proceeding.

Petitioner now seeks a judgment pursuant to Article 78 reviewing and annulling City’s denial of Accident Disability Retirement benefits, a declaration that its action was arbitrary and capricious and an order directing City to retire petitioner with Accident Disability Retirement benefits. In the alternative, Petitioner requests a hearing on the factual issues presented here, or a direction that the Board of Trustees allow petitioner to present testimony at a hearing before the Trustees to prove his entitlement to Accident Disability Retirement benefits.

The judicial review of an administrative determination is limited to the grounds invoked by the agency. (*Lindemann v. American Horse Shows Assn.*, 222 A.D.2d 248, 250 [1st Dept. 1995]). The reviewing court may not substitute its judgment for that of the agency’s determination but must decide if the agency’s decision is supported on any reasonable basis. (*Matter of Clancy - Cullen Storage Co. V. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency’s determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. V. Glasser*, 30 N.Y. 2d 269 [1972]). The court may only declare an agency’s determination “arbitrary and capricious” if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board*

of Education, 34 N.Y.2d 222, 231 [1974]).

“In an Article 78 proceeding challenging [a] disability determination, the Medical Board’s finding will be sustained unless it lacks rational basis, or is arbitrary or capricious.” (*Matter of Borenstein v. New York City Employees’ Retirement System, et al.*, 88 N.Y. 2d 756 [1996], *citations omitted*). Additionally, “a Medical Board’s disability determination will not be disturbed if the determination is based on substantial evidence. While the quantum of evidence that meets the ‘substantial’ threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require “some credible evidence.” (*Id.*)

Often the medical evidence submitted by a retiring officer is subject to conflicting interpretations. If the Medical Board’s report regarding the officer’s disability differs from the medical opinions of Petitioner’s doctors, the Board of Trustees is “entitled to rely upon the unanimous opinion of the members of the Medical Board.” (*Matter of Spiro v. Ward*, 159 A.D.2d 225 [1st Dept. 1990]); *Matter of Quilty v. Ward*, 193 A.D.2d 439 [1st Dept. 1993]; *Matter of Vecchiarello v. Board of Trustees*, 115 Misc.2d 241 [Sup. Ct. N.Y. Cty. 1982]”).

Here, petitioner’s own doctors repeatedly diagnose him as suffering from anxiety, depression and post traumatic stress syndrome, precipitated by the December, 2004 incident. His Family practitioner, Dr. Albert J. Strojan, stated that petitioner is suffering from post traumatic stress syndrome related to the incident and that as a result, petitioner “is totally disabled and is unable to perform the duties of a New York City police officer.” Dr. Andrei-Claudian Jaeger’s report concluded that petitioner suffered from generalized anxiety disorder, acrophobia, panic disorder, depressive disorder NOS, alcohol abuse, in remission and chronic anxiety disorder interfering with his ability to return to work. His report stated that “[i]t appears that the work related incident may have precipitated significant psychological disability . . .” Dr. John T. McCann, Ph.D., found that petitioner was terrified by the December, 2004 incident, he had “daily intrusive and distressing thoughts” and “frequent flashbacks in which he relives his trauma.” Dr. McCann diagnosed petitioner as suffering from “chronic post traumatic stress disorder with secondary major depressive disorder.” Dr. Kenneth Cochran, Ph.D., a psychologist whose April 6, 2007 report is not mentioned by the Medical Board, also diagnosed petitioner as suffering from “major depressive disorder, moderate without psychotic features, post traumatic stress syndrome.” Dr. Rosenbloom’s diagnosis of petitioner was that he suffered from post traumatic stress syndrome as a result of the December, 2004 incident.

In contrast, the Doctors and medical personnel who attended petitioner during his hospital stays report that petitioner has been anxious and depressed since childhood. During his January, 2005 admission to LIJ Hillside Hospital, petitioner stated that his "chief complaint" was "mild anxiety and insomnia" and he denied having any flashbacks or nightmares. The hospital notes state that he was diagnosed with "Generalized Anxiety Disorder, Acute Stress Disorder and R/O Depressive Disorder NOS." Petitioner's June, 2006 Queens Hospital Center records state that his problems are anxiety, depression and substance abuse. The "Final Disposition and Discharge Summary" states that petitioner was provided with a list of MICA programs.

Further, the report of Police Department psychologist, Dr. Andrew Propper, Ph.D., describes petitioner in much the same way as the independent hospital personnel did, "an individual with a lifelong history of anxiety and vulnerability to stress . . ." Dr. Propper also noted that petitioner has been experiencing intense episodes of anxiety with panic attacks since at least March, 2004, months prior to the December, 2004 incident and that he has always been an anxious individual vulnerable to periods of serious anxiety in response to stressors.

In their November 17, 2006 report, the Doctors on the Police Department Medical Board questioned petitioner's credibility as it pertains to role that the December, 2004 incident played in petitioner's condition because "he gave [the Police Department] histories that did not appear true to the histories he gave in the hospital." While they do not question petitioner's symptoms of anxiety, panic and depression, they found that he does not suffer from post traumatic stress syndrome. Rather they state that "[a] study of his history reveals a person overly vulnerable to stressors." Upon review of further reports and reconsideration, the Medical Board found that petitioner's personal doctors did not adequately consider his history of difficulties. The Board stated that a diagnosis of post traumatic stress syndrome oversimplified his psychiatric condition by linking it to the December, 2004 incident.

Pctitioner argues that he was asymptomatic prior to the December, 2004 incident. However, there is substantial evidence to demonstrate that this was not so, including his personal physician's statement that he was experiencing anxiety and depression as early as March, 2004. Unlike the circumstances in *Tobin v. Steisel*, (64 NY2d 254[1985]), where the Medical Board relied on "the somewhat confusing report of its psychiatric consultant," here, there is ample independent evidence to support the contention that the December, 2004 incident was not the proximate cause of petitioner's condition.

While the determination of the Medical Board is at odds with the opinion of petitioner's Doctors, the Board of Trustees is entitled to accept the Medical Board's findings which are rational and supported by independent, credible evidence. (*Matter of Borenstein v. New York City Employees' Retirement System, et al., supra; In Re Richard Locke v. Raymond Kelly, as Police Commissioner of the City of New York*, 38 A.D.3d 363, [1st Dept. 2007]). Given the repeated inconsistencies not only between the Medical Board and petitioner's Doctors, but also between petitioner's Doctors and independent Hospital personnel, petitioner has not met the burden of demonstrating that the denial of Accident Disability Benefits was, as a matter of law, wrong. (*Meyer v. Board of Trustees of the New York City Fire Department*, 90 NY2d 139 [1997]; *Canfora v. Board of Trustees of the Police Pension Fund*, 90 AD2d 751 [1st Dept. 1982]). Under the circumstances of this case, it cannot be said that the Board of Trustees' decision was arbitrary or capricious. Wherefore it is hereby

ORDERED that the petition seeking a declaration that the New York City Police Department's Board of Trustees' action was arbitrary and capricious, and an order directing City to retire petitioner with Accident Disability Retirement benefits is denied.

All other relief requested is denied.

This constitutes the decision and order of the Court.

Dated: August 18, 2008



 Eileen A. Rakover, J.S.C.

FILED
 AUG 22 2008
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 NEW YORK