

**Matter of Grigorian v Kelly**

2008 NY Slip Op 32641(U)

September 29, 2008

Supreme Court, New York County

Docket Number: 104969/2008

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
**EILEEN A. RAKOWER**

PRESENT:

J.S.C.

Justice

PART Part 5

Index Number : 104969/2008

**GRIGORIAN, HENRY**

VS.

**KELLY, RAYMOND**

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 104969-08

MOTION DATE

MOTION SEQ. NO. #001

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

were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2

3, 4

5

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**FILED**

OCT 01 2008

COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: Sept 29, 2008

[Signature]  
**EILEEN A. RAKOWER** J.S.C.  
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
In the Matter of the Application of  
HENRY GRIGORIAN,

Petitioner,

Index No.  
104969/08

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

- against -

RAYMOND KELLY, as Police Commissioner of  
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,

Decision  
and Order

**FILED**  
OCT 01 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Mot. Seq. 001

Respondents.

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

Petitioner Henry Grigorian became a police officer with the New York City Police Department in April, 1985, after successfully completing all exams and demonstrating that he was physically and mentally fit to perform a police officer's duties. On January 8, 2001, petitioner was in his RMP, was performing a traffic stop of a civilian vehicle and was parked behind that civilian vehicle. Another vehicle slid on the icy roadway and struck the RMP. Officer Grigorian was treated and released at NY Downtown Hospital for back injuries.

The accident and back injury were documented in a "Line of Duty Injury Report." That line of duty report was amended to include head and neck injury in a document dated February 12, 2001. That amendment, however, includes a paragraph referencing a visit to and diagnosis by an Ophthalmologist on February 16, 2001, a date after February 12, 2001. It is endorsed by a police surgeon and Lieutenant on February 26, 2001.

3 ]

Officer Grigorian had submitted previous line of duty injury reports: he fell from his police scooter on March 9, 1987; and he was punched and bitten by an individual he was arresting on October 15, 1986. Neither resulted in a long term absence from work.

Commencing with the accident on January 8, 2001, Officer Grigorian pursued medical attention continuously: on January 30, 2001 he was seen by an orthopedic surgeon; on February 5, 2001 he underwent an MRI of the lumbar spine; on February 6, 2001 he underwent an MRI of the cervical spine; on February 9, 2001 he saw Dr. Wani complaining of headaches, cervical and lumbar pain, and radicular symptoms; on February 15, 2001 he underwent an MRI of the brain; on November 27, 2001 he was seen by a Department orthopedic surgeon, who recommended restricted duty; on February 27, 2002 he saw a pain management specialist; on March 12, 2002 Dr. Axelrod recommended limited capacity; on March 14, 2002, March 28, 2002 and April 11, 2002 he underwent three lumbar epidural steroid injections with IV sedation; on July 31, 2002 Dr. Axelrod recommended full duty; on September 12, 2002 he underwent an MRI of the thoracic spine; on November 18, 2002 he saw Dr. Mango, who recommended further treatment; on January 14, 2003 Dr. Axelrod authorized epidural steroid injections, but recommended full duty.

There is a gap until September 9, 2005, when Grigorian made his request for accident disability. He saw a Department orthopedic surgeon, who recommended full duty. On September 19, 2005 he saw Dr. Mango, who recommended diagnostic tests and treatment; on October 25, 2005 he saw Dr. Miller again, who authorized MRI scans, but recommended full duty; on November 5, 2005 he underwent an MRI of the lumbar spine and an MRI of the cervical spine. Grigorian retired on full duty on December 31, 2005. He was in possession of his firearm at the time and had qualified at the range in 2005.

Pursuant to the Medical Board Police Pension Fund Article II and Officer Grigorian's request for accident disability retirement (ADR) and the Police Commissioner's request for ordinary disability retirement (ODR), the Medical Board examined and interviewed Officer Grigorian on April 5, 2006. It found

that the documentation, physical examination and review of the MRI scans do not demonstrate that the detective is disabled from performing the full duties of a New York City Police Officer. In light of this, the Article II Medical Board unanimously recommends disapproval of the

[ \* 4 ]

detective's own application for Accident Disability Retirement and disapproval of the Police Commissioner's application for Ordinary Disability Retirement.

The Board of Trustees, Police Pension Fund, Article II, notified petitioner, by letter dated October 9, 2006, that it remanded his application for re-evaluation and re-examination. The basis for the above was "new evidence to be submitted."

The new evidence included, a letter dated June 23, 2006, with findings and recommendations from Dr. Marc Chernoff, an orthopedic spine surgeon; a letter dated June 30, 2006, with findings and recommendations from Dr. Enrico Mango, an orthopedic surgeon; a Chernoff letter dated July 7, 2006; a Chernoff letter dated September 1, 2006; and an interview and examination of Grigorian by the Medical Board on December 13, 2006. The Medical Board found:

Based on the history, the physical examination and the medical records available, it was the unanimous opinion of the Article II Medical Board that there were no significant orthopedic findings precluding the detective from performing the full duties of a New York City Police Officer. In light of that, the Article II Medical Board reaffirms its previous decision and recommends disapproval of the detective's own application for Accident Disability Retirement and disapproval of the Police Commissioner's application for Ordinary Disability Retirement.

The Board of Trustees, Police Pension Fund, Article II, by letter dated March 21, 2007, requested the application for Disability retirement be reevaluated, citing "new evidence." The Medical Board considered the findings and recommendations of Dr. Sebastian Lattuga, an orthopedic spine surgeon. Although, the Medical Board noted that Dr. Lattuga did not mention an off duty accident that the detective had in 2003. The Board considered a February 26, 2007 visit with Dr. James Liguori, a neurologist, and an EMG/NCV study Grigorian underwent. The Board considered the examination and impressions by Dr. Lattuga on March 5, 2007. The Board interviewed and examined Grigorian on August 15, 2007. Ultimately, they concluded:

The Article II Medical Board finds that the new documentary and clinical evidence fails to substantiate that the detective was disabled at the time of his retirement in 2005. Therefore, the Article II Medical

5 ]

Board reaffirms its previous decision and recommends disapproval of the detective's own application for Accident Disability Retirement and disapproval of the Police Commissioner's application for Ordinary Disability Retirement.

Petitioner was examined, reexamined and reexamined again by the Medical Board. The Board considered and reiterated the findings of various doctors and objective tests performed on petitioner. Ultimately, the Board's own findings concluded that petitioner did not exhibit a debilitating back injury at the time of his retirement sufficient to qualify him for ADR. The Board's findings are discussed with specificity and detail.

Petitioner now seeks a judgment pursuant to Article 78 reviewing and annulling the denial of Accident Disability Retirement benefits, a declaration that the Board's action was arbitrary and capricious and an order directing the remand of the matter for further consideration. Petitioner urges that it submitted evidence demonstrating herniated discs, radiculopathy and carpal tunnel syndrome, and the Medical Board failed to explain why it found that petitioner could perform full duty with these conditions.

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 [1<sup>st</sup> 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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept. 1990]); *Matter of Quilty v. Ward*, 193 A.D.2d 439 [1<sup>st</sup> Dept. 1993]; *Matter of Vecchiarello v. Board of Trustees*, 115 Misc.2d 241 [Sup. Ct. N.Y. Cty. 1982]”).

Here, petitioner’s own doctor, Dr. Mango, took issue with the Police Department’s findings in his letter dated June 30, 2006:

The report states that upon physical examination by your physician he had excellent range of motion of both the cervical and lumbar area, and that his straight leg raise in the seated position was to 90 degrees and in the supine position was to 60 degrees with some back pain. Based on *all* my previous physical examinations of his neck and low back I must question these findings. Since all conservative methods of treatment have been unsuccessful in relieving his pain, he has been referred to Dr. Stephen, an orthopedic spine surgeon for further care.

While the determination of the Medical Board is at odds with the opinion of petitioner’s Doctor, 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, [1<sup>st</sup> Dept. 2007]). Given the independent examinations of Grigorian by the Medical Board and Grigorian’s own reports of pain, his history of not medicating his pain, his activities including qualifying at the range in 2005 and his continued possession of a firearm until his retirement in December 31, 2005, 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 [1<sup>st</sup> 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

[\*7]

ORDERED that the petition seeking to annul respondents' determination to deny ADR and to remand this matter to respondents for further consideration is denied.

All other relief requested is denied.

This constitutes the decision and order of the Court.

Dated: September 29, 2008



Eileen A. Rakower, J.S.C.

**FILED**  
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NEW YORK