

Matter of Laird v Kelly
2008 NY Slip Op 32665(U)
September 25, 2008
Supreme Court, New York County
Docket Number: 100296/08
Judge: Nicholas Figueroa
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS EGLETTON
Justice

PART 46

Index Number : 100296/2008
LAIRD, SEAN
VS.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 100296/08
MOTION DATE 4/18/08
MOTION SEQ. NO. 001
MOTION CAL. NO. _____
this motion to/for Article 78

PAPERS NUMBERED
1, 2, 3
4, 5
6

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

Be accompanied by decision 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 141B).

Dated: SEPT. 25, 2008

[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
COUNTY OF NEW YORK: PART 46

In the Matter of the Application of
SEAN LAIRD,

Index No. 100296/08

Petitioner,

**DECISION AND
JUDGMENT**

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

- against -

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,

UNFILED JUDGMENT
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).*

Respondents.

Nicholas Figueroa, J.:

Petitioner seeks a judgment, pursuant to CPLR Article 78, reversing and annulling respondents' determination denying him an accident disability retirement (ADR) pension (see Admin. Code of the City of NY §13-252).

While respondents' Medical Board determined that petitioner was disabled because of a right knee injury, they found that his line of duty injuries did not cause his disability. The Medical Board also considered the petitioner's ADR application based on a back injury, because there was insufficient medical evidence to support his claim of a back disability.

The Medical Board conducted its own examinations. Additionally, it also considered the reports of petitioner's own physicians.

Respondents' Board of Trustees reached a deadlock on the question of whether petitioner's knee injuries entitled him to an ADR; therefore, petitioner was entitled to the ADR (see *Matter of Meyer*, 90 NY2d 144, 145). The Board of Trustees accepted, as it was required to do, the Medical Board's conclusion that petitioner's back problems did not qualify him for an ADR (see *Matter of Borenstein v. New York City Employees' Retirement System*, 88 NY2d 756, 760-61).

Petitioner alleged that he suffered various injuries between August 15, 1997 and May 3, 2001.

Petitioner states that on August 15, 1997, while descending a ladder during a building search, he felt something "pop in his lower back."

On April 14, 1998, petitioner claims that he stepped off a curb, "while leaving the location of a prior radio assignment", lost his balance and twisted his right knee.

On May 3, 2001, petitioner alleges that his knee buckled, causing a sprain, when he was returning to his police vehicle, after stopping a civilian car, and stepped into a pothole.

Finally, on February 2, 2003, while responding to a domestic dispute, petitioner slipped on a wet carpet outside the premises. Petitioner states that he felt a sharp pain in his right knee and back.

The Medical Board determined that petitioner's knee problems were the result of gouty arthritis and the residual effects of arthroscopies, and not the result of line of duty accidents.

A June, 1998 operative report, following surgery to repair a torn meniscus, noted the presence of gouty arthropathy and gouty crystals in petitioner's right knee medial joint compartment. Gouty

arthritis is a metabolic disease; it is not caused by injury. A report after petitioner's June, 2001 knee surgery gave a diagnosis of gouty arthritis and stated that there was no internal knee derangement.

Petitioner informed the Medical Board that he had been diagnosed with gout in 1992 and 1993, five and six years before his first alleged line of duty injury.

Petitioner's physicians did not submit reports opining that his injuries resulted from line of duty injuries.

Dr. Mallen, one of petitioner's doctors, stated, in a July 11, 2005 report, that petitioner had "...long-standing problems to his right knee", and that he had a knee arthroscopy in 1994, before the first alleged injury, and one in 2001. Dr. Mallen noted that petitioner was doing well until "approximately one month ago [June, 2005] when he had an acute exacerbation of symptoms in the right knee without any specific history of injury, accident or trauma". Dr. Mallen also noted that "it is difficult to determine if the fraying of [petitioner's] menisci represents an acute injury or is a chronic degenerative process or post surgical remnants."

Dr. Shah, also petitioner's physician, opined in a September 20, 2005 report, that many of petitioner's symptoms on the medical side of his knee are the result of petitioner's arthroscopic surgeries.

Respondents argue that the issue is not whether petitioner sustained a line of duty injury to his knee; rather, the issue is whether the injuries caused the knee disability. The Medical Board found that there was no credible evidence to support petitioner's contention that his line of duty injuries caused his knee disability. Rather, the Medical Board determined that the disability resulted from prior surgeries and gouty arthritis that is not caused by an injury.

Because the Board of Trustees was deadlocked on the question of whether petitioner was entitled to an ADR, the court, in order to vacate the Medical Board's finding, must determine whether the Medical Board's finding was incorrect as a matter of law. That is, the court must determine, as a matter of law, that petitioner's disability was "the natural and proximate result of a service connected accident". (*Matter of Canfora v. Board of Trustees of the Police Pension Fund of the Police Department/The City of New York*, 60 NY2d 347, 352.

The evidence in this case reveals that petitioner's disability was not caused by his injuries. The court cannot reject, as a matter of law, the finding that petitioner had a pre-existing medical condition as demonstrated in the medical records as well as his physicians' reports, that caused the disability.

Nor can the court set aside the finding that petitioner's back problems were not disabling (see *Matter of Borenstein v. New York City Employees' Retirement System, id.*).

The Medical Board reviewed petitioner's medical reports regarding his back and conducted its own physical examinations.

The Medical Board's November 15, 2005 examination showed that petitioner could heel and walk and could easily perform three quarters of a deep knee bend. The examination revealed no sciatic notch tenderness. Petitioner was able to raise his legs to eighty-five degrees in a seated position and had "a good buttock contraction."

The Medical Board examined petitioner again on April 27, 2007. Again, he was able to heel and toe walk and had a normal gait. He could squat and rise without difficulty. A lumbar spine examination again revealed no tenderness. Petitioner could fully extend his back. His rotation was normal and he could flex to eighty-five degrees. Petitioner had full motor strength in his lower

extremities; his leg raising was normal.

When the Medical Board interviewed him, petitioner stated that although he had back pain and was experiencing numbness radiating down his left leg to his foot, he was neither taking medication nor receiving medical treatment.

The medical evidence petitioner submitted also supports the Medical Board's determination.

Petitioner submitted an x-ray taken on August 16, 1997, following his second injury. The film did not reveal any vertebrae fractures and the x-ray report stated that "vertebrae body heights and disc spaces appear well-maintained."

On February 2, 2003, following another of petitioner's injury, an x-ray taken at Jamaica Hospital revealed no vertebrae fractures. Nerve conduction tests that day were within normal limits. The tests revealed no evidence of lower extremity muscle denervation.

On October 4, 2008, petitioner's physician found that petitioner's straight leg raises were negative and that his lumbar spine flexion was "minimally provocative upon extreme range of motion." Further, the examination was "negative for paravertebrae tenderness."

The court may not disturb the determination regarding petitioner's back injury, as the Medical Board's findings were based on "same credible evidence" (*Matter of Myer v. Board of Trustees of the New York City Fire Department, id.*, at 145, 146). The Medical Board's finding is a scientific determination that it made within its area of expertise (see *Matter of Nemeck v. Board of Trustees of the New York City Fire Department*, 99 AD2d 954, 955).

The Medical Board's conclusion was rational, as it was based on its own examinations as well as the physicians' reports that petitioner submitted. Again, its finding that petitioner was not entitled to an ADR because of his back complaints was binding on the Board of Trustees (*Matter*

of *Borenstein v. New York City Employees' Retirement System, id.*). Petitioner has not met his burden of showing that he was physically incapacitated from performing his duties as a result of his injuries. Therefore, the court may not annul respondents' determination.

The court has examined petitioner's remaining arguments, including the contention that he is entitled to a trial in this court, and finds them to be without merit.


Accordingly, it is

ADJUDGED that respondents' determination is confirmed, the petition denied and the proceeding dismissed.

This constitutes the decision and judgment of the court.

Dated: September 25, 2008

ENTER



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 141B).