

Matter of Goroway v Kelly

2008 NY Slip Op 33017(U)

October 31, 2008

Supreme Court, New York County

Docket Number: 108227/08

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 5

Index Number : 108227/2008

GOROWAY, DOUGLAS

INDEX NO. _____

vs

KELLY, RAYMOND

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

MOTION CAL. NO. _____

is motion to/for _____

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

NOV 10 2008

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

CLERK'S OFFICE
NEW YORK

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

Dated: 10/31/08

EILEEN A. RAKOWER
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
DOUGLAS GOROWAY,

Petitioner,

Index No.
108227/08

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

- against -

Decision
and Order

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,

Respondents.

FILED

Mot. Seq. 001

NOV 18 2008
X

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HON. EILEEN A. RAKOWER:

Petitioner Douglas Goroway, appointed to the New York City Police Department in April 30, 1991, filed an application for accident disability retirement (ADR) from the New York City Police Department in January of 2004. His application was based on two line of duty injuries: the first, on April 27, 1998, when he injured his left knee when he slipped on stairs during an investigation at an illicit unlicensed massage premise; and the second, on October 21, 1999, when he injured his left knee while changing a tire on a department vehicle, aggravating the pre existing injury while attempting to get up from a crouching position. After surgeries and physical therapy, petitioner resumed his duties as a police officer. According to a medical note dated January 31, 2000, he was permitted to return to work on full duty with no restrictions. Mr. Goroway ultimately retired from the Police Department in February 2004, one month after making application for ADR.

The Medical Board, as of April 26, 2004, determined that Goroway was not eligible for ADR. However, in light of subsequent surgeries to petitioner's left knee, the application was remanded back to the Medical Board. The application was again denied. In July 2005 the application was again remanded to the Medical Board to consider additional findings regarding petitioner's knee. Again, the application was denied. Petitioner brought an Article 78 proceeding, which resulted in the decision of Justice Sheila Abdus- Salaam, dated February 15, 2007. Justice Abdus-Salaam remanded the matter back to respondents "for an adequate evaluation of the evidence and an explanation as to how they reached their determination."

Justice Abdus-Salaam noted areas of concern, stating that "the Medical Board never mentioned or addressed the fact that although petitioner had been on 'full duty' when he retired, his actual assignments since 1997 had been to inside or light duty posts." Further, the Board determined that petitioner's August 2004 arthroscopy was a "new development" and "not related to petitioner's service in the Police Department, notwithstanding that petitioner had sustained two line of duty injuries to his left knee while in service and that the 'new development' was surgery to that left knee."

Following the court ordered remand, the Medical Board issued a reaffirmance of its previous decision disapproving the ADR dated July 2, 2007. It noted that

The Medical Board took into consideration its previous decision based on the fact that the MRI of May 24, 2005 did not reveal any ACL laxity or postoperative changes. In addition, the detective's examination did not reveal any instability. In addition, his x-rays of 2004 were within normal limits. The detective remained on full duty up until his retirement of 2004 and the Medical Board is aware that he did work on a task force.

Petitioner received a final denial of his disability retirement application by letter dated February 19, 2008. Petitioner then had an additional surgery to his left knee on February 28, 2008. The operation consisted of arthroscopy and debridement of the left knee, and partial medial and partial lateral meniscectomy.

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 respondents to retire petitioner with a line of duty accident disability retirement allowance; or directing a

hearing on the factual issues raised; or directing the Board of Trustees of the Police Department Article II Pension Fund to allow petitioner and/or his representatives to present such testimony as is necessary at a hearing held before the Board of Trustees in order to prove his entitlement to an accident disability retirement.

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, the board relied on reports and tests dating back to petitioner's first surgery on his left knee when he was 15 years old. The board followed the numerous surgeries, MRI reports, medical records and diagnoses over the course of petitioner's years, from before becoming a police officer, while a police officer and after his

retirement from the police department. The Board had the records indicating that petitioner was permitted to return to work on full duty without restrictions as of January 31, 2000. Further, it had the records of Doctor Gregory M. Lieberman, indicating that he presented again with pain in his left knee on January 7, 2004, stating that since his last visit, he had been active and had indeed returned to work. A note dated January 12, 2004 indicates "he is usually pretty active, likes to jog on a treadmill."

The board's initial denial of ADR in August 2004 came after its own examination of petitioner, where it noted, among other things, that petitioner walked with no limp. Upon reconsideration, the Board again examined petitioner in early 2005, this time noting he was walking with a minimal limp on his left side. The Medical Board, noting that petitioner had retired in February 2004, and noting the events in the left knee and taking into consideration the findings of the previous Medical Board, determined that "it appears the new development is not related to petitioner's service in the police department."

The Board reviewed petitioner's application for a third time in August 2005. It reviewed new evidence of degenerative arthritis in the left knee and MRI findings suggestive of degenerative disease process. A Doctor Levy opined that petitioner was totally disabled from functioning as a police officer. The Medical Board conducted its own examination of petitioner. Again, it denied ADR.

Responsive to the court ordered remand, the Board reviewed the application of petitioner a fourth time. It did a complete re evaluation of the various MRI findings, petitioner's medical records detailing petitioner's surgeries, its own numerous examinations and interviews with the petitioner, all done after petitioner stopped working, X-rays, and petitioner's work history. Based on all of these, the Medical Board reaffirmed its previous decision disapproving ADR.

Respondent urges that the Board concluded that there was credible evidence to support its findings that petitioner did not demonstrate he had a disability of his left knee which prevented him from performing all of his duties as a police officer. It continuously noted that after his injury, he continued to work as a police officer, even working as a member of a task force prior to his retirement, albeit his duties were office-based. The Medical Board points out that the relevant date for purposes of disability is the date of separation from service.

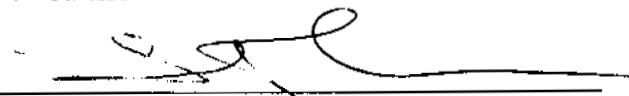
While the determination of the Medical Board is at odds with the opinion of petitioner's Doctor, the Board of Trustees is entitled to accept the Medical Board's findings which are rational and supported by independent, credible evidence. (*Matter of Borenstein v. New York City Employees' Retirement System, et al., supra; In Re Richard Locke v. Raymond Kelly, as Police Commissioner of the City of New York*, 38 A.D.3d 363, [1st Dept. 2007]). Given the independent examinations of petitioner by the Medical Board and petitioner's continued performance of full duties as a police officer for a number of years after his reported line of duty incidents, 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 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: October 31, 2008


Eileen A. Rakower, J.S.C.

FILED
NOV 10 2008
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NEW YORK