

**Matter of Goodacre v Kelly**

2008 NY Slip Op 33113(U)

November 18, 2008

Supreme Court, New York County

Docket Number: 103789/08

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
*Justice*

PART ~~1A~~ **16**

Index Number : 103789/2008  
**GOODACRE, CHARLES**  
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 ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.

and notice of entry of judgment shall be filed with the County Clerk  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

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

Dated: NOV 18 2008

*Alice Schlesinger*  
\_\_\_\_\_  
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: IAS PART 16

-----X  
In the Matter of the Application of

CHARLES GOODACRE,

Petitioner,

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

-against -

Index No. 103789/08  
Motion Seq. No. 001

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

Respondent  
-----X

SCHLESINGER, J:

**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**  
**1418).**

Petitioner Charles Goodacre was appointed to the NYPD uniformed force on July 25, 1985. He retired in July 2003 at the age of 51. On March 10, 2003, a few months before his retirement, he submitted an application for Accident Disability Retirement ("ADR") benefits under the provisions of General Municipal Law §207-k (the "Heart Bill").

On May 27, 2007, after multiple remands and examinations by the Medical Board and after commencing an earlier Article 78 proceeding in April 2006, and a final remand to the Medical Board on April 12, 2007, that Board rejected the last piece of new evidence provided by the officer, a letter from Dr. Thomas Constantino dated March 27, 2007, and again reaffirmed its many earlier decisions and recommended the approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the officer's own application for Accident Disability Retirement. Their diagnosis was "Bridging

across the left Anterior Descending Artery.” Their explanation for this decision is the following:

Systolic bridging of the left anterior descending coronary artery was reported and a review of the reports showed that this could possibly result in serious complications. Since the finding of systolic bridge across the epicardial artery is not known to be a stress or occupational related heart condition, the Article 11 Medical Board recommended Ordinary Disability Retirement. The presence of atherosclerosis per say (*sic*) does not in itself result in disability. It is disability when it causes evidence of significant myocardial ischemia which constitutes a basis of Heart Bill related disability.

(See ¶5 of the May 25, 2007 Memo from the Medical Board to the Board of Trustees). On November 14, 2007, the Board accepted this recommendation. This decision gave rise to Mr. Goodacre’s instant Article 78 petition wherein he seeks a judgment annulling respondents’ disapproval of his request for a line of duty, or Accident Disability Retirement, pension and granting him these benefits under General Municipal Law §207-k as a matter of law.

Section 207-k, known as the Heart Bill, establishes that under certain conditions, there shall be a presumption that a heart-related condition was incurred in the performance and discharge of duty. It is a presumption that can be disproved by competent evidence. The law defining the presumption speaks of “any condition of the heart ... resulting in total or partial disability (to a paid member of the police department) where such policeman successfully passed a physical examination on entry into the service of such a respective department, which examination failed to reveal any evidence of such condition.”

The issue here is whether respondents have successfully rebutted that presumption. Such is the issue because finally after many findings of no disability the Medical Board did, on May 21, 2004, rescind its previous decision and recommend approval of Ordinary Disability, their diagnosis being Myocardial Bridging involving the Left Anterior Descending Artery. This decision recognized that, based on the literature and the review of two echocardiograms, such a muscle band has been shown to "on rare occasions" create ischemic events. It should also be noted that a June 8, 2003 cardiac catheterization of Mr. Goodacre revealed not only this systolic bridging but also moderate diffuse atherosclerosis in his right coronary artery and branches.

Further, in its February 25, 2005 memo, issued the same day that the Medical Board interviewed and examined petitioner, the doctors described Goodacre's recent history as follows:

He retired on full duty in June 2003. He is currently not working. He states he had been fairly stable medically since October 2004. Subsequently, he began to feel more fatigued and would occasionally wake up with chest pains and experience pressure in the chest when walking. This prompted him to have reevaluation of his heart disease. He underwent a thallium stress test and a cardiac catheterization. He describes his chest pain as a pressure below the left clavicle which rarely radiates toward the back of his chest. It may occur at rest or with activity.

The report then details the various medications Goodacre was on, including sublingual nitroglycerin, Plavix, Imdur, Topiol, Vasoretic, Lipitor and aspirin.

In the next paragraph, the Board reports Goodacre's blood pressure, 170/90, but comments no further. It is this continued omission, the virtual ignoring of Goodacre's persistent hypertension which I will detail momentarily, which compels my findings that respondents have failed to rebut the Heart Bill's presumption and that petitioner does in fact suffer from a heart related disability.

After the February 25, 2005 examination, wherein the Medical Board reserved decision, petitioner was again seen on May 20 of that year. His complaints were virtually the same and again his blood pressure was 170/90. There, the disapproval was reaffirmed even though the Board found some progression of atherosclerosis and remarked casually about his hypertension.

As early as January 24, 2001, petitioner was noted by Dr. Swamy as having a resting blood pressure of 150/80. In a January 14, 2003 report by Dr. Arton, he was diagnosed with hypertensive heart disease. The Medical Board found, upon an examination of May 2, 2003, a blood pressure of 170/90. In June of 2003, while in the Emergency Room at Staten Island University Hospital, his blood pressure was recorded as 195/94.

Petitioner's cardiologist, Dr. Thomas Costantino in a June 30, 2003 letter, stated that Mr. Goodacre was suffering from "hypertensive cardiovascular disease." And in a subsequent letter of September 1, 2004, found that he was at risk for complications of progressive atherosclerosis. On November 17, 2006, upon examination, petitioner's blood pressure was recorded as 160/80 in each arm. However, despite medication for this condition and the obvious elevated rate, the Board found this hypertension was "well controlled."

Counsel for the respondents discusses cases where there has been a successful rebuttal of the presumption when there is heart disease, the origin of which is unknown or idiopathic and there is an absence of stress-related pathologies such as coronary heart disease, ischemia and/or significant hypertension. But that is not the situation here because Goodacre does in fact have coronary heart disease, some ischemia, although mild, and significant hypertension.

Counsel argues also that the above does not apply when the Board has found a non-idiopathic heart condition. But I do not agree that such a finding was ever made here. Quite the contrary, the record makes it apparent that the petitioner is suffering from a stress-related condition. While it may be the case that his ischemia and coronary artery disease are not disabling in and by themselves, and while the myocardial bridging may not be related to either one, his unrelenting hypertension together with the above, all documented in countless invasive tests, together with his clinical appearance and intake of serious heart medications, create an irresistible conclusion that he is suffering from a disabling condition of the heart.

Therefore, I find that as a matter of law, this presentation has not been successfully rebutted. Thus, I find that Mr. Goodacre is entitled to Accident Disability Retirement benefits, and I am remanding the proceeding to the respondents so that they make such a finding and such an award.

Accordingly, it is hereby

ADJUDGED that the petition is granted and the determination of respondent denying petitioner's application for Accident Disability Retirement benefits is vacated and

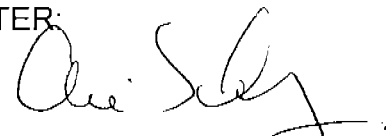
annulled and the matter is remanded for new findings and an award consistent with this decision.

This constitutes the decision and judgment of this Court.

Dated: November 18, 2008

NOV 18 2008

ENTER:



ALICE SCHLESINGER

*Warrant of Execution No. 14187*  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be given until the Clerk has  
obtain entry, counsel or authorized representative may  
appear in person at the Judgment Clerk's Office  
14187.