

Matter of Lloyd v Kelly
2009 NY Slip Op 30233(U)
January 26, 2009
Supreme Court, New York County
Docket Number: 105720/08
Judge: James A. Yates
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

ISUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. JAMES A. YATES _____ PART 50Y _____

In the Matter of the Application of
Cyril C. Lloyd,
Petitioner,

INDEX NO. 105720/08

For a Judgment Pursuant to CPLR Article 78

MOTION DATE _____

MOTION SEQ. NO. 001 _____

-against-

MOTION CAL. NO. _____

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, and THE CITY OF NEW YORK,

FILED
FEB 04 2009
COUNTY CLERK'S OFFICE
NEW YORK

Respondents. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits...	_____
Answering Affidavits - Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

In this Article 78 proceeding, Petitioner is seeking annulment of
Respondents' determination denying him accidental disability retirement benefits.
On examination of the record, the Court concludes that Petitioner is not entitled to

these benefits as a matter of law. Nor was the decision of the Board of Trustees denying Petitioner accidental disability retirement benefits arbitrary or capricious. Accordingly, the petition is denied and dismissed (see attached Decision and Order).

Dated 1-26-09

ENTER: _____

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

HON. JAMES A. YATES

PARTY
SUP. CT. N.Y. COUNTY

FILED

FEB 04 2009

COUNTY CLERK'S OFFICE
NEW YORK

Background

On July 16, 1986, Petitioner joined the New York City Police Department (NYPD), and eventually rose to the rank of Detective Investigator. On August 31, 2005, Petitioner applied for Accidental Disability Retirement (ADR) benefits. The Police Commissioner processed an application for Ordinary Disability Retirement (ODR) on behalf of Mr. Lloyd, predicated upon Lumbar Spine Derangement, on November 7, 2005. In his application, Petitioner alleged that his back problems were the result of a line of duty injury incident that occurred on May 18, 2004 when he "sustained a lower back sprain/strain injury [during] an undercover operation [that involved Petitioner receiving] chiropractic treatment from [an] alleged[ly] licensed chiropractor." (*See Resp. Verified Answer*, ex. 2, LOD Injury Report, dated May 21, 2004.) He was working as an undercover operative for the Medical Fraud Unit, a joint investigative initiative of the NYPD and the Federal Bureau of Investigations.

While Petitioner's ADR application only mentions the May 18, 2004 incident, Petitioner suffered a Line-of- Duty (LOD) back injury on August 1, 1989, which Mr. Lloyd has "forgotten about," contending it "was a long time ago." *Id.*, ex.12, Memo. from Medical Board to Board of Trustees, dated January 31, 2007 and 19, Memo. from Medical Board to Board of Trustees, dated June 6, 2007.¹

Almost three months after the undercover investigation, on August 12, 2004, Mr. Lloyd sought treatment from Dr. Frank J. Schwab, Orthopedic Surgeon at Maimonides Medical Center, for the persistent pain in his lower back. An x-ray of Mr. Lloyd's lumbar spine revealed "what appear to be congenitally short pedicles at L4-L5, with disc height collapse at L5-S1." (*Resp. Answer*, ex. 5, Doctor's Notes.) On August 20, 2004, an MRI performed by Dr. Shankman of Pinnacle Diagnostic Radiology, showed "broad based degenerative disc protrusion . . . with osteophytic ridging" as well as "encroachment at the floor of the neural foramina." *Id.*, ex. 6, MRI Lumbar Spine Report dated Aug. 20, 2004. On August 24, 2004, Dr. Schwab gave Petitioner medical prescriptions for physical therapy and possible epidural injections of his lumbar spine. On September 24, 2004, Petitioner began his physical therapy sessions. On July 14, 2005, Dr. Schwab found Petitioner to be "plagued by significant back pain and radiating symptoms." *Id.*, ex. 8, Doctor Schwab's Notes. Dr. Schwab diagnosed Mr. Lloyd with spinal stenosis, planned to treat him with epidural injections and a back brace, and noted that Petitioner might need surgery in the future. Petitioner continued with physical therapy through October 19, 2005. Dr. Schwab also opined that Petitioner should only return to restricted duty. He was assigned to "desk duty" from August 2004 through April 30, 2007, the date of his retirement.

¹ On August 1, 1989, Petitioner was a member of the Queens Narcotics Division. He suffered a line-of-duty injury while assisting other police officers effecting the arrest of four individuals in an automobile. On October 30, 1989, Petitioner re-injured his back and was placed on sick report until November 7, 1989. Mr. Lloyd also suffered two other LOD injuries: on April 7, 1992, Petitioner sustained an injury to his right shoulder while on post, and on July 18, 2000, he again injured his right shoulder when attempting to apprehend a resisting suspect. It is not contended that these injuries are relevant to Mr. Lloyd's current disability status.

On June 17, 2005, Dr. Walfredo Leon, NYPD District Officer, requested Petitioner's medical information from Dr. Schwab. There was also a consultation referral with Dr. Frederick Fensterer, Police Surgeon, on July 20, 2005. Dr. Fensterer noted that Petitioner's prognosis was fair, and that he had good power and motion. He also recommended pain management and physical therapy. On August 15, 2005, Petitioner consulted with Dr. Vallo Benjamin, Professor of Neurosurgery at the New York University (NYU) School of Medicine. In his report, dated August 15th, Dr. Benjamin stated:

"I saw this 43 year old NYPD Officer in my office for initial neurosurgical consultation today, with a chief complaint of lower back pain radiating down his legs (the right more than the left) . . . The patient has been on restricted duty . . . and has had physical therapy and [pain] medication but no injections . . . Upon examination his deep tendon reflexes are present and equal, and he is neurological intact . . . I do not feel that the patient requires surgical intervention, and recommend that he continue treating his pain conservatively with physical therapy and pain management."

(*Resp. Answer*, ex. 27, at No. 43, Letter from Dr. Benjamin, dated August 15, 2005.)

On November 9, 2005, Petitioner, at the request of Dr. Schwab, underwent another MRI performed by Dr. Shankman. Dr. Shankman found no significant change compared to his previous examination of August 20, 2004. On or about November 30, 2005, the Police Pension Fund Medical Board considered Petitioner's ADR application and the Police Commissioner's application for ODR. The Medical Board reviewed the file, interviewed Petitioner, and conducted a physical examination. During his interview, the Petitioner complained of "stiffness after sitting or standing for prolonged periods of time requiring him to shift positions," referred repeatedly to "trying to find a balance with his back," and "shifted his weight to be more comfortable." (*Resp. Answer*, ex. 3, Memo. from Medical Board to Board of Trustees, dated Nov. 30, 2005.) Petitioner was not specific about patterns of pain. The Petitioner was wearing a back brace during the interview. The Medical Board found that the clinical and documentary evidence failed to substantiate that the Petitioner was disabled from performing his duties based on the condition of his lumbar sacral spine and rejected both applications for retirement benefits.

On March 15, 2006, Dr. James A. Liguori, who is Board Certified in Neurology, performed an Electromyography (EMG) test on Petitioner. The test records the contraction of muscles as a result of electrical stimulation, and Dr. Liguori found "Right L5-S1 Radiculopathy." *Id.*, ex. 14, Medical Report. The next day he was examined by Dr. Schwab who wrote in his medical report: ". . . The patient has been wearing a brace. He is still struggling due to his back pain and has not returned to the police force."

On April 12, 2006, the Board of Trustees reconsidered Petitioner's disability applications and Michael Welsome, Executive Director of the NYPD Pension Fund, remanded the case to the Medical Board and requested a reevaluation in light of Petitioner's newly submitted evidence.

6]

On April 6, 2006, Petitioner consulted with Dr. Sebastian Lattuga, Director of the Division of Spine Surgery at Franklin North Shore LIJ Health System, for evaluation. Dr. Lattuga is Board Certified in Orthopedics and Spine Surgery. He diagnosed Mr. Lloyd with "disc herniations, marked instability secondary to multiple level lumbar instability syndrome and post-traumatic disc diseases." *Id.*, ex. 15, New Patient Consultation Form, dated April 6, 2006. The Petitioner continued to experience chronic back pain and Dr. Schwab recommended surgery. On July 19, 2006, Dr. Schwab performed spinal fusion surgery on Petitioner at the NYU Hospital for Joint Diseases.

On January 31, 2007, the Article II Medical Board again reviewed Mr. Lloyd's applications based on new evidence which included the November 9, 2005 MRI. This time the Medical Board approved the ODR and submitted a Certificate of Disability to the NYPD, finding that Mr. Lloyd was unable to perform the duties of a police officer. In their report, the Medical Board noted that the "degenerative" findings from Dr. Schwab's initial x-ray were only three months after the May 18, 2004 LOD injury and "could not be a result of that event." (*Resp. Answer*, ex. 12, Memo. from Medical Board to Board of Trustees, dated Jan. 31, 2007.) Dr. Schwab, in response to the Medical Board's finding on causation, stated that the May 18, 2004 LOD injury "may have aggravated" the degenerative condition.

On March 21, 2007, Petitioner submitted his pension application for service retirement to the NYPD. On April 11, 2007, the Board of Trustees reconsidered Petitioner's disability applications. On April 17, 2007, Michael Welsome, Executive Director of the NYPD Pension Fund, remanded the case to the Medical Board and requested a reevaluation of Petitioner's newly submitted evidence. On June 6, 2007, the Medical Board reviewed Mr. Lloyd's case for the third time and reviewed two letters from Dr. Schwab as new evidence. In a memorandum to the Board of Trustees written on June 6th, the Medical Board quoted from one of Dr Schwab's letters that Mr. Lloyd's LOD injury "may have aggravated [Mr. Lloyd's prior] condition." The Medical Board stated that it had "reviewed all the material presented" and again recommended the approval of Mr. Lloyd's ODR and denial of his ADR. The Medical Board specifically stated that it "[d]id not find the chiropractic manipulation described [by Petitioner] to be the competent causal factor of [Petitioner's] disability."

On December 20, 2007, Mr. Lloyd submitted an affidavit to the NYPD regarding his May 18, 2004 LOD injury stating that he never left his desk after the LOD injury. On January 9, 2008, the Board of Trustees denied his application for ADR benefits. However, it granted ODR benefits.² The reasoning expressed by the Board was that Mr. Lloyd did not have a sick report or change in official duty status soon enough after the LOD injury to establish a causal linkage. On January 10, 2008, Mr. Lloyd received the final administrative denial of his ADR application from the New York City Police Pension Fund. Following the Board of Trustees' determination, Petitioner commenced this Article 78 proceeding on April 23, 2008.

² When, as here, the Board of Trustees reaches a tie vote (six to six) and is deadlocked on the issue of whether a member's disability is causally related to a service-related accident, the member is generally denied ADR and granted ODR benefits. (*See Matter of Meyer v Board of Trustees of the NYC Fire Dept.*, 90 NY2d 139, 145-146 [1997].)

Discussion

The determination that Mr. Lloyd's line-of-duty injury was not the proximate cause of his disabling back condition was based on "some credible evidence" and thus was not arbitrary or capricious. (See *Matter of Canfora v Bd. of Trustees of the Police Pension Fund, Article II*, 60 NY2d 347 [1983].) An application for accidental disability retirement involves a two-tier administrative process. (See *Matter of Meyer v Bd. of Trustees of the Fire Dept Art. 1-B Pension Fund*, 90 NY2d 139, 144 [1997].) Following a medical examination, the three - physician member pension fund Medical Board determines whether the pension fund member is disabled for performance of duty and ought to be retired. (NY Adm Code § 113-352.) If the Medical Board concludes that a member is disabled, it must then determine whether the disability is a "natural and proximate result of an accidental injury received in such city service " and certify its recommendation on that issue to the Board of Trustees, the administrative body ultimately responsible for retiring the member and determining the question of service-related causation. (NY Adm Code §§§ 13-353, 13-323 [b], 13-168 [a].)

When an application for ADR is denied, and the lesser ODR benefits are awarded, a reviewing court may not set aside the Board of Trustees' denial of ADR benefits unless "it can be determined as a matter of law on the record that the disability was the natural and proximate result of the service-related incident. *Meyer*, 90 NY2d at 145. Furthermore, the decision of the Board of Trustees related to the cause of a police officer's disability will not be disturbed unless its factual findings are not supported by "some credible evidence" or its final determination is arbitrary and capricious." (*Matter of Canfora v Bd. of Trustees of the Police Pension Fund, Article II*, 60 NY2d 347, 351 [1983] citing *Matter of Fiore v Board of Education*, 48 AD2d 850 [2nd Dept 1975], *affd* 39 NY2d 1016.)

An applicant for accident disability retirement benefits must prove (1) the existence of a disability and (2) that the disability is causally related - either directly or by precipitating or aggravating a latent or pre-existing condition - to an injury sustained in the line of duty. (See *Matter of Drayson v Bd. of Trustees of the Police Pension Fund*, 37 AD2d 378 [1st Dept 1971], *affd* 32 NY2d 852 [1973]; see also *Matter of Tobin v Steisel*, 64 NY2d 254 [1985].) The applicant must also prove that the injury was the result of an accident and not merely employment-related. (See *Matter of Lichtenstein v Bd. of Trustees of the Police Pension Fund*, 57 NY2d 1010, 1012 [1982] (internal citations omitted) (Court of Appeals defines an accident as a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact").) "To be distinguished are injuries sustained while performing routine duties but not resulting from unexpected events." (*Matter of McCambridge v McGuire*, 62 NY2d 563, 568 [1984].)

In this case, the undercover investigation of a chiropractor was an "out of the ordinary" duty for Mr. Lloyd. It also was unexpected that a chiropractor would twist and manipulate his back during the investigation in a manner that would cause pain. Nevertheless, Petitioner failed to meet his burden of showing a causal connection between his line-of-duty injury and his degenerative back condition. The Medical Board considered Petitioner's clinical and documentary evidence, and its own interviews and examination of Petitioner. It noted that the MRI of August 2004 demonstrated degenerative changes with later films unchanged. Mr. Lloyd submitted a letter from Dr. Schwab, his treating physician, suggesting that the LOD injury may

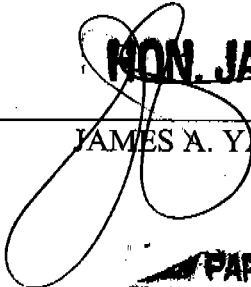
8]

have aggravated the degenerative condition, however, where the medical evidence is conflicting, it is the sole province of the Medical Board to resolve the conflict. (*Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996].) On examination of the record in this case, the Medical Board based its decision that the chiropractic manipulation was not the causal factor of Petitioner's disability on the credible evidence of the time between his line-of-duty accident and the onset of his symptoms. There was no evidence Mr. Lloyd reported sick on or about the time of the injury, nor did he have an immediate change of duty status. As well, the Board reasonably relied on all the medical evidence when they concluded that the degenerative changes and loss of disc space following the line-of- duty injury on May 18, 2004 could not be the result of that event. Furthermore, the Board of Trustees is entitled to rely on the Medical Board's conclusions after considering Petitioner's own doctors. The determination of both Boards, therefore, was not arbitrary or capricious. Nor is Petitioner entitled to accidental disability retirement benefits as a matter of law.

Accordingly, Petitioner's request for annulment of the Board of Trustees' determination is denied and the Article 78 petition is dismissed.

This constitutes the Decision and Order of the Court.

Dated: January 26, 2009


JAMES A. YATES

JAMES A. YATES, J.S.C.
PART 507
SUP. CT. N.Y. COUNTY

FILED
FEB 04 2009
COUNTY CLERK'S OFFICE
NEW YORK