

Matter of Higgins v Kelly

2009 NY Slip Op 32566(U)

October 29, 2009

Supreme Court, New York County

Docket Number: 106107/09

Judge: Walter B. Tolub

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

TOLUB

PART 15

Index Number : 106107/2009

HIGGINS, HEIDI

vs.

KELLY, RAYMOND

SEQUENCE NUMBER : # 001

ARTICLE 78

Justice

INDEX NO. 106107-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

FILED
NOV 04 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/24/09

TOLUB 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 15

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In the Matter of the Application of
HEIDI HIGGINS,

Index No. 106107/09

Petitioner,

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

Mtn. Seq. 001

-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,

FILED
NOV 04 2009
COUNTY CLERK'S OFFICE
NEW YORK

Respondents.

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WALTER B. TOLUB, J.:

This is a Petition to; (1) annul Respondents' denial of
Petitioner's application for an accident disability retirement
allowance pursuant to General Municipal Law (GML) §207-k; (2) an
order directing Respondents to retire Petitioner with an accident
disability allowance; or in the alternative (3) for an order
directing a hearing to prove entitlement to an accident
disability retirement allowance. Additionally, Petitioner seeks
an order pursuant to CPLR §2307(a), directing Respondents to turn
over certain document related to the denial of Petitioner's
accident disability retirement allowance.

Facts

Petitioner was appointed a uniformed officer of the New

York Police Department (NYPD) on July 15, 1986.

On February 1, 2000, Petitioner experienced an episode of dizziness, chest pain and shortness of breath while working at the 24th Precinct, and was transported to Columbia Presbyterian Hospital (Respondents' Ex. 1).

On August 2, 2002, Petitioner again had an episode of dizziness, chest pain and shortness of breath while working at the 24th Precinct and was transported to Good Samaritan Hospital (Respondents' Ex. 2).

On June 15, 2004, Petitioner complained of head pain and chest pain, she became confused and felt faint. Petitioner was admitted to Columbia Presbyterian Hospital (Respondents' Ex. 3).

On February 17, 2006, Petitioner submitted an application for Accident Disability Retirement (ADR) under GML §207-k (Heart Bill). In her application, Petitioner stated that "I complain of a heart condition and request accident disability as a result of the Heart Bill 207-k" (Respondents' Ex. 4). Additionally, Petitioner requested that the Medical Board consider the diagnosis of Dr. Philip Smith which states that she has "Cardiac Ischemia involving LAD/ Atrial Fibrillation" (Id.).

On July 21, 2006, the Medical Board Pension Fund, Article II (Medical Board) interviewed and examined Petitioner. The Medical Board memorialized its investigation by letter dated July 21, 2006 directed to the Board of Trustees Police Pension Fund (Board

of Trustees). The letter stated, in pertinent part that:

- In 1995 Petitioner was brought to the emergency room at St. Luke's Roosevelt Hospital following a syncopal episode. She was diagnosed with asthma and heat stroke.
- Beginning in 1999, a Holter monitor reveals an episode of a nonsustained monomorphic ventricular tachycardia. The Holter recordings also revealed an episodic atrial fibrillation and narrow complex supraventricular tachycardia.
- In 1999 Petitioner underwent a tilt table test which was positive, and caused hypertension. Petitioner was also tested for Lyme disease.
- Petitioner then underwent a CT scan of her chest which revealed a small 2-3mm nodular density in her lung.
- Because of chest pain, in 2000, Petitioner underwent a nuclear stress test and cardiac catheterization. The tests revealed no perfusion defect but that Petitioner had a mildly elevated ventricular diastolic pressure.
- Also in 2000, Petitioner had continued episodes of palpitations. She underwent an electrophysiologic, after which no abnormalities were found.
- On September 29, 2002, Petitioner was seen by cardiologist Dr. Israel Berkowitz. His prognosis was poor for full duty and Petitioner was then placed on limited capacity.
- In March 2004, Petitioner was found to have an intra atrial septal aneurysm.
- On May 3, 2004, Petitioner was seen by a neurologist, Dr. Nicholas Tsirilakis. Dr. Tsirilakis diagnosed Petitioner as having TIA and recommended physical therapy and Coumadin. Petitioner was placed on continued sick report.
- On June 15, 2004 Petitioner was admitted to the hospital for weakness and dysphasia. No abnormalities were found after tests were performed and Petitioner was placed on Coumadin.
- In April 20, 2005, Petitioner underwent the insertion of a pacemaker. Because of an infection, the pacemaker was subsequently removed and then re-implanted.
- In June 2005, Petitioner went to the hospital because of swelling in her right arm.
- On November 7, 2007 Petitioner was placed back on limited duty.
- Two months later, in January of 2006, because of continued chest pain, Petitioner underwent a perfusion test which showed evidence consistent with ischemia.
- In February of 2006, Petitioner underwent a cardiac catheterization.
- Petitioner stated that sometime in 2004, she first developed some neurological symptoms which consisted of weakness on the left side, slurred speech and a slowing of her mental function.

Investigator who wrote the report concludes by stating:

In summary, the detective has cardiac arrhythmia of undetermined etiology (Lyme disease may be the underlying cause]. She is on anti coagulation for prevention of further transient ischemic cerebral attacks, and because of the venous thrombosis in the right arm. Because of these considerations, it is the unanimous decision of the Article II Medical Board to recommend approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the detective's own application for Accident Disability Retirement.

(Respondents' Ex. 5/Petitioner's Ex. A).

On December 12, 2006, the Board of Trustees reviewed Petitioner's ADR application and remanded it to the Medical Board for consideration of the newly amended GML §207-k. Specifically, the minutes state:

We are going to remand this back to the Medical Board under recently enacted amended Heart Bill and we want the Medical Board to look at this for purposes of the stroke.

This detective suffered a stroke back in February of '04. She spent two weeks in the stroke unit at Columbia-Presbyterian Hospital.

* * *

[W]e would like the Medical Board to look at this based on the statute, which indicates that if a member is disabled from a stroke, they are entitled to the presumption independent of whether the member is active at the time, on active duty or not on active duty.

(Respondents' Ex. 8 pg. 31-32).

The Medical board reviewed Petitioner's ADR application again on February 1, 2008. The Medical Board's report stated in

pertinent part that:

It was the final decision of the Article II Medical board to unanimously recommend approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the detective's own application for Accident Disability Retirement. The final diagnosis was Cardiac Arrhythmia, Cause Undermined.

* * *

The new medical evidence provided by the detective for this evaluation includes a letter dated January 28, 2008, from Dr. Syed Nasir, a neurologist. He stated that the detective was under his care for a stroke which she suffered in 2004. . . He stated that given multiple co-morbid conditions, including hypertension, her risk of stroke was high. Hence, the detective requires Coumadin for stroke prevention. . .

It appears that the detective's current neurologist, as well as her previous neurologist, Dr. Jin Lee, and his report [sic] March 1, 2004, agree with the Medical Board that the detective's stroke was most likely the result of her cardiac arrhythmia or the postulate possibly an episode of Lyme disease. The detective had a sudden onset of left side hemiparesis and hypesthesia lasting a few seconds, with speech difficulty and a second episode of disorientation. Even with the resolution of these symptoms, the detective had persistent left side hypesthesia and mild left hemiparesis. This was consistent with cerebrovascular disease. Etiologies were high on the differential. First, the detective had a significant cardiac history including arrhythmia secondary to Lyme disease with sustained intermittent palpitations also the possibility of atrial fibrillation or other arrhythmia could be a significant factor for cerebrovascular disease.

Moreover, it is well recognized in the medical literature that cardiac arrhythmia, such as the detective demonstrates can cause strokes. Hence, it is the unanimous opinion of the Article II Medical Board to reaffirm its previous decision and recommend approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the detective's own application for Accident Disability Retirement. The final diagnosis is Stroke, Secondary to Cardiac Arrhythmia. (Petitioner's Ex. D).

Between April 2008 and July 2008, Petitioner had acquired at least 5 reports from various doctors explaining, *inter alia*, that Petitioner had hypertension. Some of the letters also stated that petitioner suffered a stroke because of her hypertension [as opposed to arrhythmia] (Petitioner's Exs. E-K).

At its June 11, 2008 meeting, the Board of trustees voted to remand Petitioner's ADR application back to the Medical Board for consideration of new evidence, and specifically, whether Petitioner's stroke was caused by hypertension, and not cardiac arrhythmia or Lyme disease (Respondents' Exs. 10 and 11/ Petitioner's Ex. I). The Board of Trustees also stated that:

Since the Heart Bill/Stroke Bill is a presumptive bill, the courts have concluded that determinations of the Medical Board that are based on most liklies [sic] or possibilities is just not sufficient to rebut the presumption.

So we are going to remand this case back to the Medical Board based on the above comments, along with some new medical evidence that we hope will provide a comfort level to the Medical Board because that

medical evidence conclusively demonstrates that DETECTIVE HIGGINS' stroke was, in fact, caused by hypertension, which is a condition that's covered under the bill and the evidence also definitively proves that Lyme disease was not a factor in this particular case, since the evidence demonstrates that her stroke was caused by hypertension, not by cardiac arrhythmia or Lyme disease.

DETECTIVE HIGGINS is entitled by law to the presumption in the Heart Bill/Stroke Bill since there isn't any evidence in the record that is sufficient to rebut this presumption. (Petitioner's Ex. I p.35, ln. 10-23).

On August 29, 2008, the Medical Board again reviewed Petitioner's application for ADR. The Medical Board conducted a detailed review of Petitioner's medical history and noted that hypertension was not listed in the more than 10 years of cardiac medical history provided by Petitioner. The Medical Board noted that arrhythmia was present and that Petitioner did not get a pacemaker because of hypertension. The Medical Board stated that:

It was hoped that the Medical Board made it clear that it looked hard and long for documentation of hypertension and that this, in spite of some of the statements made by the recent medical documentations, was not found. Hence, it is the unanimous opinion of this Article II Medical Board that there is no evidence of hypertension causing the stroke of Detective Higgins. The Medical Board reaffirms its previous decision and recommends approval of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the detective's own application for Accident Disability Retirement. The final diagnosis is Cardiac Arrhythmias, Status Post

Implantation of Pacemaker and Stroke.
(Respondents' Ex. 12, ¶27).

On January 14, 2009, the Board of Trustees concurred with the Medical Board's determination that Petitioner's condition does not meet the requirements of the Heart/Stroke Bill and denied Petitioner's ADR application (Respondents' Ex. 16).

Petitioner filed the instant Article 78 proceeding arguing that the denial of Petitioner's application for an ADR pension is arbitrary, capricious, unreasonable, unlawful and contrary to the laws applicable under the circumstances. Petitioner also argues that the Medical Board's decision was contrary to the competent evidence presented and that the Board of Trustees did not provide the Petitioner a full and fair opportunity to establish entitlement to an ADR pension.

Discussion

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 (Borenstein v. NYCERS, 88 NY2d 756 [1996] citing Matter of Canfora v. Board of Trustees, 60 NY2d 347, 351 [1983]; Matter of Pell v Board of Educ., 34 NY2d 222, 230-231 [1974]).

Generally, the burden of proof as to disability is on the petitioner and a petitioner must prove that the disability was the result of an accidental injury received in City services (Archul v. Board of Trustees of the New York City Fire Dept., 93

AD2d 716 [1st Dept 1983]). There is no presumption in a petitioner's favor which the board must overcome (Id.).

However, the Heart/Stroke Bill, encompassed in GML §207-k, grants eligible members who are disabled, due to a heart or stroke condition¹, an evidentiary presumption that the disabling heart or stroke condition is the result of an accidental injury received in the performance of official duties (GML §207-k(a); Uniformed Firefighters Ass'n, Local 94, IAFF, AFL-CIO v. Beekman, 52 NY2d 463 [1981]). The presumption can be rebutted by competent evidence (Id.).

"[T]he theory behind the bill, as outlined by its proponents, is not only that heart conditions are an occupational hazard for police officers and firemen, but also that this is a unique condition which generally is not the result of any particular incident but involves a gradual and progressive degeneration as a result of the continuous stress and strain of the job" (Uniformed Firefighters Ass'n, Local 94, IAFF, AFL-CIO v. Beekman, 52 NY2d 463,471 [1981]).

When a heart disability results from coronary artery disease, ischemic heart disease or hypertensive heart disease, the presumption contained in the Heart/Stroke Bill is generally not rebutted (Lunt v. Kelly, 227 AD2d 200 [1st Dept 1996]);

¹The stroke provision of GML §207-k was added in 2006 and was made retroactive to January 2002. There is no judicial application of the stroke provision of the Heart/Stroke Bill. Therefore, this court examines cases interpreting the Bill prior to the 2006 amendment.

Travers v. Kelly, 12 Misc3d 887 [Sup. Ct. NY Cty. 2006]; Hutnik v. Kelly, 37 AD3d 346 [1st Dept 2007]).

The presumption is more likely to be rebutted where the Trustees rely on the opinion of the Medical Board that the disabling condition is not job-related or caused by stress, or, that there are no findings of stress related pathology such as significant related hypertension or some coronary disease (DeMonico v. Kelly, 49 AD3d 265 [1st Dept 2008]; Vallas v. Safir, 304 AD2d 353 [1st Dept 2003] Quilty v. Ward, 193 Ad2d 439 [1st Dept 1993]).

In the instant matter, Respondent argues that this is a case governed by those decisions holding that the Heart Bill presumption is rebutted where there are no findings of stress related pathology that would suggest that the condition is job related or caused by stress.

Petitioner argues that the Board of Trustees is responsible for conducting an independent inquiry into a difference of opinion between an independent consulting specialist who examined the Petitioner and the Medical Board (Matter of Brady v. City of New York, 22 NY2d 601 [1968]). Additionally, Petitioner argues that the Board of Trustees had a duty to see that competent evidence be relied upon and sufficient explanations be given by the Medical Board's disapproval of Petitioner's application for ADR (Matter of Duester v. McGuire, 81 AD2d 553 [1st Dept 1980]).

Petitioner believes that the Board of Trustees abdicated their responsibilities by adopting the Medical Board's decision and that this Court should not permit the decision to stand.

Here, the Medical Board examined Petitioner on four occasions and the Board of Trustees evaluated the Medical Board on four occasions. The Medical Board took into consideration Petitioner's examining doctors' reports, prior treatment, medical history, hospital and operative records and reevaluated its prior determinations as directed to by the Board of Trustees. On each occasion, although some causes were ruled out, the Medical Board found no evidence that Petitioner suffered from severe hypertension at the time of her stroke in 2004, or that hypertension was the cause of her stroke. The Medical Board's detailed determination, as can be seen in the reports, was not merely conclusory.

Even though there appear to be medical controversies, and the Board of Trustees highlighted these controversies to the Medical Board, where conflicting evidence and medical reports are presented before the Medical Board, it is solely within the province of the Medical Board and the Board of Trustees to resolve the conflict (Santoro v. Board of Trustees of the New York City Fire Department, 217 AD2d 660 [2d Dept 1995]). This Court may not substitute its judgment on medical issues for that of an administrative body designated by statute to resolve


medical controversies (Id). Moreover, the Medical Board's determination was neither arbitrary nor capricious and was sustained by competent evidence. As such, the Petition must be and is dismissed.

Accordingly, it is

ORDERED that the Petition is dismissed.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/29/09



HON. WALTER B. TOLUB, J.S.C.

FILED
NOV 04 2009
COUNTY CLERK'S OFFICE
NEW YORK