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

PRESENT: HON. EILEEN A. RAKOWER Justice PART 15

Index Number : 100517/2009

BARBOUR, KEITH

VS.

KELLY, RAYMOND

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 100517-09

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 ...	1-5
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be given pursuant to CPLR 5513. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 1/12/10

HON. 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 15

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In the Matter of the Application of
KEITH BARBOUR,

Petitioner,

-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,

Respondents.

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Index No.
100517/09

DECISION
and ORDER

Mot. Seq.
001

HON. EILEEN A. RAKOWER:

Petitioner Keith Barbour ("Petitioner"), a retired New York Police Department ("NYPD") officer, brings the instant Article 78 Petition seeking to annul the September 10, 2008 decision of Respondent Board of Trustees of the Police Pension Fund ("Board of Trustees") to deny Petitioner accidental disability retirement ("ADR") and to instead award ordinary disability retirement ("ODR") upon his separation from service with the NYPD.

Petitioner was appointed to the NYPD on July 18, 1996 and, pursuant to New York City Administrative Code ("NYC Admin. Code") §13-214, became a member of the New York City Police Pension Fund. Petitioner filed two separate applications for ADR on July 2, 2003. One application was predicated upon claimed injuries to his back and leg allegedly sustained in the line of duty; while the other was based upon a heart condition.

In his ADR application for back and leg injuries, Petitioner attributed the injuries to an incident on April 21, 2001 ("the 4/21/01 incident"), when Petitioner

attempted to subdue an emotionally disturbed individual after he had become uncooperative and violent.

Petitioner's ADR application for his back and leg problems was first reviewed by the Medical Board on April 14, 2004. In it's April 14, 2004 examination, the Medical Board noted that Petitioner had "a previous history of back problems, with an MRI being performed in 1999, which showed an L4-5 and L5-S1 degenerative disc disease." The Medical Board also noted consultations with regard to Petitioner's back which predated the 4/21/01 incident, as well as an EMG which disclosed a radiculopathy and neuropathy. The Medical Board also interviewed Petitioner and conducted a physical examination. Based upon the foregoing, the Medical Board determined that Petitioner had "a severe diabetic neuropathy in his lower extremities, as evidenced by the numbness, the absent position in vibration sense, and the areflexia which is present." Accordingly, the Medical Board determined that Petitioner was in fact disabled from performing the functions of an NYPD officer, but not due to a line of duty injury, and recommended ODR.

The Board of Trustees remanded the case to the Medical Board on August 11, 2004 to consider new evidence, and to specifically address Petitioner's orthopedic complaints and the evidence pertaining thereto.

Pursuant to the 8/11/04 remand, the Medical Board again considered Petitioner's ADR application with respect to his back and leg problems on February 8, 2006. There, the Medical Board referred to the record of its prior evaluation, and considered new evidence in the form of a note from Petitioner's doctor dated August 3, 2004. The doctor noted that Petitioner was diagnosed as having "herniated/bulging/degenerative lumbar discs at L4-5 and L5-S1(ICD 722.52 and 722.10) and lumbar radiculitis (ICD 724.4)." The Medical Board concluded that

> Based on the review of the history, the medical records, the clinical findings, it was felt by all the members of the Article II Medical Board that there were significant objective findings precluding the officer from performing the full duties of a New York City Police Officer. In light of that, the Article II Medical Board unanimously reaffirms its previous decision and recommends approval

> of the Police Commissioner's application for Ordinary Disability Retirement and disapproval of the officer's application for Accident Disability Retirement.

By a tie vote of 6-6, the Board of Trustees awarded Petitioner ODR, and denied his application for ADR on November 8, 2006 (*see City of New York v. Schoeck*, 294 N.Y. 559 [1945]).

Petitioner subsequently appealed the Board of Trustee's determination in an Article 78 proceeding (*Barbour v. Kelly*, 2008 N.Y. Misc. LEXIS 717 [Sup. Ct. N.Y. Cty. 2008]) ("*Barbour I*"). By decision dated January 16, 2008, the Hon. Walter B. Tolub found that

> ... the Medical Board failed to articulate whether petitioner's disability was the natural and proximate result of his LOD accident, or whether it was the result of another cause. Both determinations by the Medical Board failed to make a specific finding as to any causal connection between petitioner's disability and its possible cause

(*id.* at *6). Accordingly, Justice Tolub found that the Board of Trustee's reliance on the Medical Board's recommendation lacked a rational basis, and ordered that the matter be remitted to the Medical Board to "if necessary, conduct an additional hearing before issuing a comprehensive determination on the subject application, and upon issuance of a comprehensive determination, shall present such to the Board of Trustees" (*id.* at *8).

In accordance with Justice Tolub's decision, the Board of Trustees remanded Petitioner's ADR application based upon his back and leg problems to the Medical Board, which again considered the matter on May 28, 2008. The Medical Board's evaluation began by recounting and making reference to its prior meetings regarding the matter, and the evidence introduced at those meetings. In addressing the decision in *Barbour I*, the Medical Board stated that

> [i]t is the Medical Board's opinion that the diagnosis of Diabetic Neuropathy, Moderate to Severe explained and articulated the cause of the disability. If the Medical

> Board felt that the officer's line of duty injury was the natural and proximate cause of his disability, it would have been articulated in the final diagnosis along with the date of the line of duty incident as is the usual and customary format.... It was noted in the detailed minutes of April 14, 2004 that the electrodiagnostic studies (EMG/NCV) findings April 15, 2000 were noted in which diabetic neuropathy was diagnosed. There was also an examination of the deep tendon reflexes performed, which were absent. The motor strength was 5/5. There was no atrophy. The sensory examination showed impaired vibration and position sense, severe left more than right and straight leg raises in the seated position were to 80° and in the supine position were to 75°. A complete neurologic and orthopedic examination of the lower extremities position sense, the EMG/NCV reports and the known diabetes, the diabetic condition and neuropathy was diagnosed. There was no loss of motor strength, atrophy or limited straight leg raising that is commonly found in radiculopathies....
>
> ... In summary, the Medical Board finds that the incident of April 21, 2001 did not precipitate the neuropathy found in the EMG reports of 2000, did not precipitate the absent reflexes and did not precipitate the impairment of vibration and position sense. It is the conclusion of the Medical Board that the officer's disability was based on his medical condition of diabetes and the resulting sequela.

Accordingly, the Medical Board again recommended approval of ODR and disapproval of ADR.

By a tie vote of 6-6, the Board of Trustees awarded Petitioner ODR on September 8, 2008.

As noted above, Petitioner also filed for ADR for a heart condition pursuant to General Municipal Law §207-k ("Heart Bill"). The Medical Board reviewed

Petitioner's Heart Bill application for the first time on February 20, 2004. The Medical Board reviewed Petitioner's entire medical folder. The medical folder included reports from a lab test in August 1999; reports of echocardiograms from New York Hospital of Queens done on August 30, 1999; discharge notes from New York Hospital of Queens; records from a June 15, 2000 visit to Elmhurst Hospital where he was seen with chest discomfort and moderate diaphoresis; an echocardiogram done on June 15, 2000; an echocardiogram done by Dr. Oviasu on July 19, 2000; an EKG exercise stress test performed by Dr. Oviasu the following day, which noted a hypertensive response to exercise; a visit to NYPD cardiologist Dr. Berkowitz on August 11, 2000; an echocardiogram done of October 9, 2002 by Dr. Oviasu; a February 4, 2003 cardiac catheterization by Dr. Oviasu at North Shore Hospital; an EKG from a visit to New York Hospital Queens on July 5, 2003 with a complaint of chest pain; and a February 4, 2004 report from Dr. Kobren, a cardiologist, stating that Petitioner has hypertension, diabetes mellitus, coronary artery disease and atrial fibrillation.

In addition to reviewing Petitioner's medical folder, the Medical Board interviewed Petitioner. Petitioner stated that he had a history of hypertension since 1999; and of diabetes for the previous two years. Petitioner also stated that he has been in atrial fibrillation since 1992, which occurs approximately two to three times each year, with the longest interval between episodes being four to six months. Petitioner stated that when he experiences atrial fibrillation, he develops fatigue, shortness of breath, lightheaded ness and chest discomfort. The Medical Board also conducted a physical examination of Petitioner, who was reported as 6'1" and weighing 250 pounds.

The Medical Board unanimously decided to defer its determination of Petitioner's Heart Bill application, as it awaited additional reports from Petitioner.

Petitioner's Heart Bill application was next reviewed by the Medical Board on May 7, 2004. The new evidence reviewed by the Medical Board consisted of a March 22, 2004 cardiac consult from Dr. Berkowitz. The Medical Board also re-interviewed Petitioner, who stated that he had been on restricted duty since 1999, and had absences from work relating to hospitalization. The Medical Board also conducted another physical examination of Petitioner.

The Medical Board again deferred its determination, based upon Petitioner's inability to obtain studies from his doctor which were requested by the Medical Board.

The next review by the Medical Board took place on July 2, 2004. The new evidence considered by the Medical Board consisted of the reports of two stress tests done on October 9, 2002 and July 14, 2003. Based upon its assessment of the new evidence, and the prior evaluations of Petitioner, the Medical Board found that Petitioner "has atrial fibrillation, the etiology of which is uncertain." While a July 2003 echocardiogram reported Petitioner as having LVH, or left ventricular hypertrophy, this report stated that the measurements of the posterior wall and septum were each 1.1cm in thickness (an October 2002 echocardiogram report indicated a posterior wall measurement of 1.2cm, and septum measurement of 1.3cm), and that this was insufficient to demonstrate that Petitioner's LVH rose to the level of a hypertensive heart disease.[1] Accordingly, while noting that Petitioner had a history of hypertension, "...in the absence of definite LVH on his echocardiogram, one cannot be certain that this is the cause of his atrial fibrillation." The Medical Board thus unanimously recommended approval of ODR and disapproval of ADR, diagnosing Petitioner with "Recurrent Atrial Fibrillation, requiring treatment with Coumadin."

On November 10, 2004, the Board of Trustees remanded the matter to the Medical Board in light of new evidence.

On January 21, 2005 the Medical Board once again reviewed Petitioner's Heart Bill application. The Medical Board noted that

> The officer has a history or paroxysmal atrial fibrillation and hypertension. He is also diabetic, non insulin dependent. During previous Boards, the history elicited from the officer was that he had developed paroxysmal episodes of palpitations from about 1992. Hypertension was first diagnosed in 1999 and treatment was instituted

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[1]The Medical Board notes in its January 21, 2005 determination, discussed in further detail below, that for LVH to meet the NYPD criteria as a hypertensive heart disease, it must be of a greater degree. Specifically, there must be septum and posterior wall measurements of 1.4cm or greater).

> at that time. A number of echocardiograms have been reviewed by the Medical Board. Although some of them did reveal borderline left ventricular hypertrophy, this was never of a degree (septum and posterior wall 1.4 cm) to meet the Police Department criteria for hypertensive heart disease.

The new evidence presented consisted of letters from Dr. Steven Kobren and Dr. Louis Glecke, and an echocardiogram. The Medical Board also re-interviewed Petitioner and conducted another physical examination. Petitioner was measured as 6'1" and 245 pounds. The Medical Board found "no new evidence of hypertensive heart disease (as defined by the Police Department)," and accordingly reaffirmed its prior determination.

On June 10, 2005, the Board of Trustees once again remanded the matter based upon new evidence to be submitted by Petitioner. The Medical Board met on August 25, 2006 to reconsider Petitioner's Heart Bill application; however, Petitioner failed to appear, and the Medical Board reaffirmed its prior determination. On November 3, 2006, the Board of Trustees remanded the matter to the Medical Board for consideration of the new evidence.

The Medical Board considered Petitioner's Heart Bill application for the final time on November 9, 2007. The new evidence provided by Petitioner consisted of an October 4, 2006 stress test performed by Dr. Steven Korben, and a November 9, 2006 letter from Dr. Korben stating that Petitioner had a history of hypertension, hypertensive heart disease associated with atrial fibrillation, diabetes and coronary artery disease. Petitioner was also interviewed and physically examined again. The Medical Board found that Petitioner had failed to present "any new evidence that [his] hypertension cause the atrial fibrillation," and reaffirmed its prior recommendation, which was to approve ODR but to deny ADR. The Medical Board specified that its decision was "based on the findings that his cardiac arrhythmia preceded [his] diagnosis of hypertension. The diagnosis is Atrial Fibrillation, Hypertension, Non-Insulin Dependent Diabetes, and Bronchial Asthma."

On September 10, 2008, the Board of Trustees considered Petitioner's Heart Bill ADR application in conjunction with the ADR application based upon his back

and leg problems. By a tie vote of 6-6, the Board of Trustees awarded ODR to Petitioner.

Petitioner subsequently commenced this Article 78 proceeding. Petitioner initially filed a petition *pro se*, but later obtained counsel and submitted an amended verified petition, along with a memorandum of law. Annexed to the amended verified petition as exhibits are copies of the petition, memorandum of law, and decision and order from *Barbour I*; and a copy of the Medical Board's May 28, 2008 recommendation to the Board of Trustees. Respondents submit a verified answer and memorandum of law. Annexed to Respondents' answer are forty-two exhibits, which consist of Petitioner's ADR applications; his line of duty injury reports; the Medical Board's recommendations (discussed in detail above); relevant minutes from the Board of Trustees' meetings; and medical records which were considered in Petitioner's ADR applications. Petitioner has submitted a memorandum of law in reply.

It is well settled that the determination as to whether a retiring or retired police officer is entitled to ADR involves a two-step process. First, the Medical Board must determine whether or not the applicant is in fact physically or mentally incapacitated for the performance of city-service. If the Medical Board finds that the applicant is disabled, it must then make a recommendation to the Board of Trustees as to whether the disability was the natural and proximate result of an accidental injury (*see Borenstein v. New York City Employees' Ret. Sys.*, 88 N.Y.2d 756, 760 [1996]). Where the Medical Board finds that the applicant's disability was not the natural and proximate result of an accidental injury, and the Board of Trustees denies ADR, a reviewing court can only disturb the determination if it is found to be irrational, arbitrary, capricious, an abuse of discretion, or contrary to law (*see Jefferson v. Kelly*, 2008 NY Slip Op 4564, *1-2 [1st Dept. 2008]).

A decision to deny ADR is rational, and therefore entitled to deference, where there is "some credible evidence" in the record to support the Medical Board's determination *Canonico v. Kelly,* 2007 NY Slip Op 2611, *1 [1st Dept. 2007]. Even where the petitioner introduces evidence which tends to support his or her claim that the disability was caused by a line-of-duty accident, the resolution of conflicting evidence is left to the discretion of the Medical Board (*Bailey v. Kelly*, 11 A.D.3d 208, 209 [1st Dept. 2004]). However, while the Board of Trustees is entitled to rely on the expert opinion of the Medical Board in making a determination to deny ADR, "the credible evidence standard... requires that the

Medical Board explain the basis for its conclusion that causation had not been established" (*Barbour I* at *8) (*citing Meyer v. Bd. of Trs. of New York City Fire Dep't*, 90 N.Y.2s 139, 148 [1997]). In addition, when ODR is awarded pursuant to a 6-6 vote by the Board of Trustees, the court cannot set aside the award unless it can conclude as a matter of law that the disability was the natural and proximate result of a service-related accident (*see Canfora v. Board of Trustees*, 60 N.Y.2d 347, 351-52 [1983]).

Turning first to Petitioner's ADR application based upon his back and leg issues, the court finds that Respondents' decision to deny ADR and instead award ODR was supported by credible medical evidence in the record, and thus cannot be disturbed by the court. Unlike its prior determination of February 8, 2006, the Medical Board's most recent decision sufficiently articulated its finding that Petitioner's back and leg problems were caused by diabetic neuropathy, and not from the 4/21/01 incident. The Medical Board explained that Petitioner's examinations showed no loss of motor strength, atrophy or limited straight leg raising; and that this was inconsistent with Petitioner's theory that his back and leg problems were caused by the 4/21/01 incident. To the extent that the Medical Board had previously failed to clarify the basis of its findings, it has sufficiently done so here.

Turning now to Petitioner's Heart Bill application, General Municipal Law §207-k provides a presumption to police officers who successfully passed a physical examination upon entry into police service that any heart condition resulting in total or partial disability or death was "incurred in the performance and discharge of duty, unless the contrary can be proved by competent evidence." Here, the Medical Board noted that Petitioner stated that he had a history of atrial fibrillation since 1992 (prior to joining the NYPD), and that the etiology of the atrial fibrillation is uncertain. The Medical Board further noted in prior meeting minutes that, while one of Petitioner's doctors diagnosed Petitioner as having LVH, the thickness of his posterior wall and septum did not rise to the level of constituting a hypertensive disease, in the opinion of the Medical Board. In addition, the Medical Board ruled out that Petitioner's hypertension caused his atrial fibrillation, since "his cardiac arrhythmia preceded the officer's diagnosis of hypertension" by seven years. Based upon the foregoing, the court finds that the Medical Board's determination that the Heart Bill presumption was rebutted was supported by at least some credible evidence (*see Callghan v. Bratton*, 253 A.D.2d 390, 391-92 [1st Dept. 1998]).

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Wherefore, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: January 12, 2010

EILEEN A. RAKOWER, J.S.C.