

Matter of Costigan v Kelly

2010 NY Slip Op 30317(U)

February 11, 2010

Supreme Court, New York County

Docket Number: 109718/09

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobic

PART 6

Index Number : 109718/2009
COSTIGAN, JOHN
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 11/26/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED
1-29
30-50

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

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 1415).

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING JUDGMENT DECISION

Dated: 2/11/10

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST REFERENCE

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

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

-----X
In the Matter of the Application of
JOHN COSTIGAN,

Petitioner,

Index No. 109718/09

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

**Decision, Order,
and Judgment**

-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.

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner John Costigan brings this proceeding under Article 78 of the C.P.L.R. to annul the decision of respondent The Board of Trustees of the Police Pension Fund (the "PPF"), which denied him a line of duty Accident Disability Retirement allowance ("ADR") and Ordinary Disability Retirement ("ODR"). The other respondents are Raymond Kelly, as the police commissioner and as chairman of the PPF; the New York City Police Department (the "NYPD"); and the City of New York (the "City"). For the reasons stated below, the petition is denied.

On January 26, 1982, petitioner became an NYPD Police Officer. He is currently retired; his inability to be approved for disability payments is the basis of this Article 78 petition. Petitioner argues that he is entitled to ADR as a result of his human immunodeficiency virus ("HIV") positive status. Though petitioner's status is not in dispute, its effect on his ability to fulfill normal

police duties is.

Petitioner began work with the NYPD as a patrol officer. Between the years of 1982 and 1987, while on patrol duties, petitioner was exposed to blood and bodily fluids on numerous occasions. According to a medical report dated January 7, 2000, from Bruce E. Hirsch, M.D., in 1984, petitioner had a prolonged viral infection that caused headache, sweating, a fever, and abnormal liver function. In 1987, he experienced a similar episode. Petitioner did not know that he was HIV positive until 1994, when he underwent a blood test for life insurance; however, Dr. Hirsch opines that petitioner's two prolonged viral infection were manifestations of HIV and therefore his exposure dates back to 1984.

On October 17, 1995, petitioner began a "highly active antiretroviral therapy" ("HAART") drug regimen under the care of Dr. Hirsch. According to a December 3, 2001 letter from Dr. Hirsch, petitioner has been treated with the following medications: AZT/ddC, AZT/3TC, Crixivan, Viracept, Crixivan, and Ziagen. Petitioner experienced "diarrhea, headache, malaise, and fatigue as a result of his infection and its treatment." Furthermore, the Crixivan caused him to develop "lipodystrophy which is a deforming syndrome involving [a] fatter stomach, thin arms and legs, and increased cholesterol." Since his diagnosis and undergoing treatment for it, petitioner stopped working patrol duty and began to work office duty. While on office duty, the side effects caused him discomfort during work hours and caused him to miss or leave early from work on nearly fifty occasions. On October 21, 2001, petitioner retired from full duty.

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On January 2, 2002, the Medical Board reviewed petitioner's application for ADR and ODR. The Board discussed petitioner's HIV positive status and the various side effects caused by its treatment. The Board admitted that he was able to perform full police duties "with difficulty;" however, it found that without manifestations or a history of an opportunistic infection, petitioner was not disabled.

On June 1, 2002, petitioner wrote a letter to the PPF. He set forth that he has continuously suffered from headaches, diarrhea, lightheadedness, fatigue, malaise, anorexia, nausea, lipodystrophy, and lipoatrophy. The lipodystrophy and lipoatrophy caused him to lose muscle strength. Based on the letter, the PPF remanded petitioner's application to the Medical Board. On September 25, 2002, the Medical Board reviewed petitioner's application, examined petitioner, and determined that "[a]side from some subjective complaints, the officer has done relatively well, despite being HIV positive." The Medical Board determined that petitioner's evidence was not sufficient evidence of a disability and again recommended disapproval of petitioner's application for ADR and ODR.

On April 5, 2006, the Medical Board again reviewed petitioner's case. Neither petitioner nor respondent has an explanation for this review. Petitioner did not attend it. The Medical Board issued a decision on that date, finding that no new evidence was presented to change its original determination disapproving petitioner's application for ADR and ODR.

In 2006, Frederick Cruickshank, M.D., began to treat petitioner for HIV. On

December 12, 2008, Dr. Cruickshank wrote a letter to the NYPD that detailed the side effects from which petitioner was suffering. The side effects were the same as the ones previously discussed and included weight loss and general body pain. Dr. Cruickshank also expressed concern that if petitioner were required to perform the duties of a police officer, his health could be jeopardized by sick or unhealthy individuals and he could potentially spread HIV through blood to blood contact. The Medical Board reviewed petitioner's application for the final time on December 17, 2008. The review included affidavits from two of petitioner's co-workers in the NYPD. In the affidavits, the co-workers set forth that they witnessed petitioner suffer from malaise, headaches, lightheadedness, and general weakness. Both co-workers admitted that petitioner was given flexibility in his assignments and schedules. The Medical Board noted that petitioner's T cell count was about 600 and that he had never had an infection. It found that the evidence presented "sheds no additional light on the lieutenant's state at the time of his retirement" and reaffirmed its original determination disapproving petitioner's application for ADR and ODR.

To his petition, petitioner adds further medical evidence that post-dates the Medical Board's review and, therefore, was not considered by the Board. The additional evidence is a February 28, 2009 letter from Dr. Cruickshank. The letter is substantially similar to the December 12, 2008 letter from Dr. Cruickshank and expresses concern that petitioner cannot "properly perform assigned tours of duty on police patrol[.]"

Petitioner argues that his contraction of HIV occurred in the line of duty and that he cannot perform the duties of a police officer as a result of side effects caused by his treatment plan

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for HIV. Petitioner argues that the Medical Board acted contrary to the evidence and issued an irrational decision that ignored petitioner's condition.

ADR benefits are available when an examination and investigation shows that the applicant is physically or mentally incapacitated for the performance of duty as a natural and proximate result of an accidental injury received in the line of duty, and that such disability was not the result of willful negligence on the part of the applicant. See Administrative Code of City of New York § 13-252. If the applicant for ADR claims that he is disabled by HIV, General Municipal Law Section 207-p provides for a presumption in favor of accidental line of duty causation as long as "the employee may have been exposed to a bodily fluid of a person under his or her care or treatment, or while the employee examined, transported, or rescued or otherwise had contact with such person, in the performance of his or her duties." "In an article 78 proceeding . . . the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious." In re Borenstein v. N.Y.C. Emples. Ret. Sys., 88 N.Y.2d 756, 760 (1996) (citations omitted). Courts have annulled determinations of the Medical Board and remanded for further review when medical issues presented by the petitioner are not adequately addressed or when medical evidence is insufficient to sustain the determination. See, e.g., In re Stack v. Bd. of Trs., 38 A.D.3d 562 (2d Dep't 2007); In re Rodriguez v. Bd. of Trs., 3 A.D.3d 501 (2d Dep't 2004). The courts must not review the facts regarding the weight of the evidence, unless there is a "substantial evidence" question. In re Pell v. Bd. of Ed., 34 N.Y.2d 222, 230 (1974). The Medical Board may validly rely on its own medical opinion, even where the petitioner presents evidence contrary to the Board's opinion, so long as the opinion is rationally based in the record. See Tobin v. Steisel, 64 N.Y.2d 254, 259 (1985).

The Medical Board's determination was rationally based on sufficient evidence. Though he has HIV, petitioner was not suffering from an opportunistic infection at the time of the Medical Board's reviews. Petitioner had complaints of headaches, diarrhea, lightheadedness, fatigue, malaise, anorexia, nausea, lipodystrophy, and lipoatrophy, which were side effects consistent with his medical treatment. Nevertheless, the NYPD took steps to accommodate petitioner with flexible scheduling and administrative duties; and, petitioner's work performance was never an issue. The Medical Board was entitled to rely on its own judgment, in the face of petitioner's doctors' opinions that he was not fit for police work, because there was ample, credible evidence in the record to suggest that petitioner was capable of performing his assigned duties.

The PPF's decision to deny petitioner ADR and ODR is affirmed and the petition is dismissed in its entirety. This constitutes the decision, order, and judgment of the court.

Dated: February 11, 2010



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

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