

<b>Matter of Doorley v Kelly</b>
2010 NY Slip Op 30606(U)
March 19, 2010
Supreme Court, New York County
Docket Number: 108268/2009
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD  
Justice

PART 61

In the Matter of the Application of,  
AIDAN DOORLEY,

INDEX NO. 108268/2009

Petitioner,

MOTION DATE Nov. 18, 2009

-against-

MOTION SEQ. NO. 001

RAYMOND KELLY, *et al.*,

MOTION CAL. NO. 39

Respondents.

The following papers, numbered 1 to 6 were read on this petition pursuant to CPLR Article 78.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-5</u>
Replying Affidavits _____	<u>6</u>
Sur-Reply Affidavits _____	<u>7</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, the CPLR Article 78 petition is decided in accordance with the accompanying decision, order and judgment.

**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 7697).

Dated: 3/19/10

O. P. Sherwood  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

3-24-10

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X  
In the Matter of the Application of AIDAN DOORLEY,

Petitioner,

DECISION, ORDER  
AND JUDGMENT

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

Index No.: 108268/2009

-against-

RAYMOND KELLY, as the Police Commissioner of the  
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,

**UNFILED JUDGMENT**  
This document has not been entered by the County Clerk  
and no date of entry cannot be served based hereon. To  
be docketed, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1475).

Respondents.

-----X  
O. PETER SHERWOOD, J.:

In this CPLR Article 78 proceeding, the petitioner, Aiden Doorley ("petitioner"), a police officer, seeks judicial review and annulment of a determination by respondents 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 ("the Board of Trustees"), the New York City Police Department ("NYPD"), and the City of New York (collectively "Respondents") denying his application for an accident disability pension.

*Background*

On June 7, 2004, petitioner, while on police duty, was struck in the face by a metal rod that fell off a construction trolley and knocked him to the ground causing him to lose consciousness. Immediately after the accident, petitioner was transported to St. Luke's-Roosevelt Hospital Center emergency room where he complained of right eye pain, blurry vision and laceration. He was diagnosed with a superficial eye injury, specifically, an abrasion and swelling of the right inner eyelid and under the right lower eyelid (Ver. Answer, Ex. "14"). A CT scan was negative. He was treated with ibuprofen and released that same day with an appointment in two days at the hospital's

eye clinic and instructions to return to the ER if he experienced severe pain or decreased vision and to take Tylenol for pain.

On or about August 31, 2005, petitioner applied to the Pension Fund for a line-of-duty disability pension, known as Accident Disability Retirement (“ADR”), claiming in his application that, as a result of the aforementioned accident, he had constant pain to his back, neck and head, loss of mobility when attempting to bend or twist, difficulty and pain when sitting, standing or walking, headaches and dizziness, all of which prevented him from performing the duties of a police officer (Answer, ¶ 7, Ex. “2”). Petitioner provided medical records from various medical providers, including the results of MRI and X-ray tests. At the direction of the Police Commissioner, an application was filed with the Pension Fund, on petitioner’s behalf, for Ordinary Disability Retirement (“ODR”).

On January 31, 2006 and April 4, 2006, a medical board of the Pension Fund (“the Medical Board”) conducted interviews and physical examinations of petitioner and evaluated his medical records. Initially, the Medical Board deferred its decision “because a satisfactory examination could not be performed” possibly due to the effects of medication petitioner had taken earlier on the date of the scheduled examination (Petition, ¶ 12, Ex. “G”). On April 4, 2006, the Medical Board considered petitioner’s ADR application and the Police Commissioner’s ODR application for the second time and, after conducting examinations, concluded that petitioner was not incapacitated from performing the full duties of a police officer and recommended that the Board of Trustees deny both the ADR and ODR applications (*see* Petition ¶ 13, Ex. “H”).

After tabling petitioner’s application on June 14, 2006 and July 14, 2006, the Board of Trustees at its August 9, 2006 meeting adopted the final recommendation of the Medical Board, and denied both ADR and ODR applications (Answer ¶ 12, Ex. “5”). Petitioner did not seek judicial review of the determination on his first ADR application within the applicable limitations period (*see*, CPLR § 217). Therefore, the denial of petitioner’s first ADR and ODR applications is not at issue in this proceeding.

On or about January 11, 2007, petitioner submitted a second ADR application to the Medical Board claiming that as a result of a line-of-duty injury he suffered from constant pain, a loss of mobility and spasms in his neck and back, tingling down his left arm, headaches, fatigue and loss

[\* 4]

of concentration which prevented him from performing the full duties of a police officer (Answer ¶ 13, Ex. "6"). He again submitted copies of diagnostic testing, including an MRI, x-rays and EMG, and the record of physical therapy.<sup>1</sup> On April 3, 2007, the Medical Board again considered petitioner's ADR and ODR applications, reviewing medical records from his treating osteopath and chiropractor and from an orthopedic surgeon. Because petitioner had filed a separate psychological application, the Medical Board deferred its decision pending "development of the chart and psychological review" (Petition ¶ 14, Ex. "I").

On September 11, 2007, the Medical Board conducted an interview and physical examination of petitioner and evaluated his medical records. The Medical Board found "the lack of objective neurological and orthopedic findings comparable with radiographs and comparable with the line of duty injury this officer received" (Petition ¶ 16, Ex. "K"). It, therefore, unanimously recommended that both the ADR and ODR applications be denied (*id.*). The Board of Trustees, at its February 13, 2008 meeting, remanded petitioner's ADR application to the Medical Board for further review (Answer ¶ 17, Ex. "9").

The Medical Board considered petitioner's second ADR and ODR applications for a third time on April 8, 2008 (Answer ¶ 18). It considered "new evidence" consisting of additional medical records and conducted an interview and physical examination of petitioner (*id.*, Ex. "10"). The Medical Board reaffirmed its previous recommendation that petitioner's ADR and ODR applications

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<sup>1</sup>At about the same time as he submitted his second ADR application based upon his head, back and neck injuries, petitioner submitted an ADR application concerning an alleged psychological condition and the Police Commissioner submitted an ODR application on petitioner's behalf. The Medical Board concluded that petitioner was psychologically disabled, but that such disability was not the result of a line-of-duty injury. The Board of Trustees adopted the Medical Board's recommendation and denied the ADR application, but granted the ODR application. Petitioner commenced an Article 78 proceeding seeking judicial review of the Board of Trustee's determination (*Matter of Doorley v Kelly*, Index No. 116545/2008). By decision, order and judgment dated October 16, 2009, Justice Joan A. Madden of this Court granted the petition to the extent of annulling the findings of the Medical Board and Board of Trustees with respect to their disapproval of petitioner's ADR application and remanded the matter with directions to the Medical Board to conduct a further evaluation of petitioner's ADR application and issue a determination specifically delineating the medical conclusion, the evidence supporting such conclusion and addressing the issue of causation of petitioner's disability.

should be denied (*id.*). After tabling the case at its meetings of May 14, 2008 and July 9, 2008, the Board of Trustees at its August 13, 2008 meeting again remanded the second ADR and ODR applications to the Medical Board for further review (*id.* ¶ 19, Ex. "11").

On October 28, 2008, the Medical Board reviewed petitioner's second ADR and ODR applications for a fourth and final time (*id.* ¶ 20). It again interviewed petitioner, conducted a physical examination and reviewed "new" medical evidence before again reaffirming its previous recommendations to disapprove petitioner's ADR and ODR applications (*id.*, Ex. "12"). At its February 11, 2009 meeting, the Board of Trustees voted to adopt the recommendation of the Medical Board to deny petitioner's ADR and ODR applications (*id.* Ex. "13") ("the Determination").

Petitioner now seeks judicial review of the Determination. Petitioner also seeks, pursuant to CPLR 2307, an order directing the respondents to produce: (a) all reports, recommendations, certificates and all other documents submitted to the Article II Pension Board of Trustees of the Police Department of the City of New York in connection with the retirement of the petitioner; (b) copies of the minutes of Board of Trustees' meetings at which petitioner's ADR and ODR applications were discussed; (c) copies of the medical records, reports or notes relating to petitioner which are on file with the Article II Pension Fund and/or the NYPD; and (d) copies of the NYPD's consultation report regarding petitioner's reinstatement application.

#### *Discussion*

In an article 78 proceeding challenging a disability determination, the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary or capricious (see, *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). "Ordinarily, a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence," which "in disability cases ... has been construed to require 'some credible evidence'" (*id.* at 760-761, citing *Matter of Longo v City of New York*, 178 AD2d 253, 255 [1st Dept 1991], *affd* 79 NY2d 1011 [1992]). "[C]redible evidence is evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered" and is "evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion" (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147 [1997]; see also *Matter of Cusick v Kerik*, 305 AD2d 247, 248 [1st Dept 2003]).

“[A]pplication for accidental disability retirement involves a two-tier administrative process” (*Matter of Meyer*, 90 NY2d at 144; *see also Matter of Borenstein*, 88 NY2d at 760). First, the Medical Board must determine whether an applicant “is physically or mentally incapacitated for the performance of city-service” (Administrative Code of the City of New York [“Administrative Code”] § 13-252; *see also Matter of Meyer*, 90 NY2d at 144; *Matter of Borenstein*, 88 NY2d at 760). The Medical Board is the sole arbiter of whether the applicant is injured and whether this disability prevents the applicant from performing his duties (*id.*). Second, if the applicant is deemed to be disabled, the Medical Board makes a recommendation to the Board of Trustees whether the disability was the result of a natural and proximate line-of-duty accident. “If the Medical Board certifies that the applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny applicant’s claim” (*Matter of Borenstein*, 88 NY2d at 760). The issue of causality is reached only if the Medical Board finds the applicant is disabled.

Courts have annulled determinations of the Medical Board and the Board of Trustees and remanded to the Medical Board for further review when the medical findings do not sustain the Medical Board’s determination or when the petitioner’s medical issues were not adequately addressed (*see, e.g., Matter of Stack v Board of Trustees of New York City Fire Dept., Art. 1-B Pension Fund*, 38 AD3d 562 [2d Dept 2007]; *Matter of Rodriguez v Board of Trustees of New York City Fire Dept., Art. 1-B Pension Fund*, 3 AD3d 501 [2d Dept 2004]). Determinations of the Medical Board and the Board of Trustees have also been remanded where the medical evidence did not sustain the determination, the record did not reveal a rational evaluation of the medical evidence, or where the basis of a determination was not adequately articulated (*id.*; *see, Matter of McAdams v Kelly*, 17 Misc3d 1112 [A] [Sup. Ct. N.Y. Co. 2007]; *Matter of Weller v Kelly*, Index No. 109357/2006 [Sup Ct, N.Y. Co. 2009]). However, the Court may not substitute its judgment for that of the agency, but must decide if the agency’s decision has a reasonable basis in the record (*see, Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1<sup>st</sup> Dept 1983]).

Here, the Medical Board’s conclusion that petitioner is not physically incapacitated to perform full-duty police work lacks a rational basis. In its September 11, 2007 report (“9/11/07 Report”) (Petition, Ex. “K”), the Medical Board (a) listed petitioner’s line-of-duty injuries (11/14/06

Report, ¶¶ 2, 3); (b) reviewed an MRI scan of petitioner's lumbar spine and a report of an MRI test of his cervical spine (*id.*, ¶ 5) and physical therapy notes and notes from Dr. Barry Sloan, an osteopath; (c) interviewed petitioner and recorded his subjective complaints (*id.*, ¶ 3); and (d) performed a physical examination of petitioner's neck and lower back noting that the physical examination "was somewhat limited secondary to his posture and his inability to move (*id.*, ¶ 4). The Medical Board noted that the results of the MRIs indicated degenerative disease of the lumbar and cervical spine (*id.*, ¶ 5). The results of the physical examination showed that petitioner "had no range of motion to the neck in either direction with the exception of mild rotation to the right and left," that the same was true of the lower back "with very limited range of motion," petitioner was unable to squat or walk on his toes, but was able to walk on his heels and [h]is deep tendon reflexes were 0° and symmetrical. This may be due to medication effect. Manual motor testing did not demonstrate any weakness. There was no evidence of atrophy or fasciculations" (*id.*, ¶ 4). On this basis, the Medical Board unanimously found that "the lack of objective neurological and orthopedic findings comparable with the radiographs and comparable with the line of duty injury that this officer received" and denied petitioner's application for ADR and ODR (*id.*, ¶ 6). Upon remand from the Board of Trustees, the Medical Board in its April 8, 2008 report ("04/08/08 Report") (Answer, Ex. "10") summarized new medical evidence provided by Petitioner, including reports from an orthopedic surgeon, Dr. Scott Gray, Dr. Nityananda Podder of the University Pain Center, Dr. Sloan, and Drs. Jeff Pritsky and Mark Medici (*see* 04/08/08 Report, ¶¶ 4-8). The Medical Board also reviewed the emergency room report of the initial injury which described the eye exam at that time as within normal limits (*id.* ¶ 9). The Medical Board reported petitioner's subjective complaints (*id.*, ¶ 10), and performed a physical examination of the petitioner, which included various range-of-motion tests of his upper and lower extremities, as well as of his lumbar and cervical spine (*id.*, ¶ 11). The physical examination revealed that petitioner "could flex forward with his chest practically resting on his chest. His gait was somewhat shuffling. He could not walk on his toes and could barely walk on his heels. He did ½ deep knee bend. There was no range of motion or markedly limited range of motion to both the cervical and the lumbar area. Deep bending reflexes were + and symmetrical. There was no clonus noted. Manual motor testing was 5/5 in both the upper and lower extremities. There was no evidence of fasciculation" (*id.* ¶ 11). Based on this evidence, the Medical

Board concluded that “the MRIs, which were reviewed, and today’s physical examination do not correlate with the subjective complaints of [petitioner]. “Because of significant lack of orthopedic or neurological findings”, the Medical Board reaffirmed its prior decision and recommended denial of petitioner’s ADR and ODR applications (*id.*, ¶ 12).

In its October 28, 2008 report (“10/28/08 Report”) (Petition, exhibit “M”), the Medical Board summarized new medical evidence submitted by petitioner, including follow-up notes and letters from Dr. Gray documenting that petitioner suffered from chronic neck and lower back pain and a limited range of motion in the cervical and lumbar spine in all directions; and a letter from Dr. Sloan stating that petitioner had limited range of motion in the cervical and lumbar spine and symptoms including headaches, dizziness and blurry vision which were getting worse, back pain radiating into the lower extremities accompanied by weakness, numbness and tingling, neck pain radiating into the upper extremities and spasms in the cervical and lumbar spine and expressing his opinion that petitioner would be unable to return to duty. The Medical Board recorded petitioner’s subjective complaints, noting the medications petitioner was taking including 50 mg. of Oxycontin once a day and that petitioner was now diabetic, and performed a physical examination, which included various range-of-motion tests of Petitioner’s cervical and lumbar spine (*id.*, ¶¶ 6-7). The physical examination revealed as follows:

[Petitioner] dressed and undressed by himself. He walked with a shuffling gait. He barely stood on his heels and toes. He was unable to perform a deep knee bend. He was described having chin on chest, but this time there was a 2-3 inch gap between his chin and chest. His neck was pitched forward. There was no trapezius spasm. [Petitioner] was sweaty and his undershirt was wet. He was tremulous. He again exhibited a limited range of motion in all directions in the cervical and lumbar area. He winced when the right sacroiliac joint was touched. He was unresponsive on the left and at the sciatic notch. Attempts to get reflexes in the upper extremity was not fruitful except when [petitioner] was distracted, then they were 1 to 2+ and symmetrical. Muscle bulk was low. There were no fasciculations in the lower extremities. There was no clonus nor were there pathological reflexes. Measurements 3 ½ inches below the inferior of the of the patella were symmetrical. Manual motor testing of the right upper extremity was 5/5. In the left, in the biceps and triceps there was giveaway secondary to pain. In the left lower extremity

it was 5/5. Again, in the right lower extremity distally, giveway was secondary to pain (Answer, Ex. "12" ¶ 7).

Based on this evidence, the Medical Board concluded that "the medical submitted does not correspond to the clinical picture which has been presented, and [did] not find orthopedic or neurologic findings which are disabling" (*id.*, ¶ 8). Therefore, the Medical Board again reaffirmed its previous determination recommending denial of petitioner's ADR and ODR applications (*id.*). Therefore, all of the Medical Board's four reviews and its conclusions were based on the review of the medical records provided by petitioner, including the results of MRI and X-ray tests, as well as its own physical examinations of petitioner. Therefore, credible evidence supports the conclusions of the Medical Board (*see Matter of Meyer*, 90 NY2d at 147; *see also Matter of Borenstein*, 88 NY2d at 761).

Petitioner contends that he is, in fact, physically disabled for full-duty police work, and that the medical evidence that he submitted to the Medical Board supports this fact.

Here, although the Medical Board reviewed on four separate occasions the medical documentation furnished by petitioner and conducted its own interviews and physical examinations of the petitioner, the Medical Board failed to adequately address the crucial evidence that petitioner suffered from crippling neck and back pain which it confirmed by its range of motion testing and which demonstrated a limited range of motion in all directions. Moreover, petitioner's subjective complaints were supported by his own treating physicians, at least one of whom concluded that petitioner was disabled from performing police work. In denying petitioner's applications, the Medical Board simply summarized the medical reports submitted by petitioner, as well as its own evaluation of petitioner's medical state, and fails to set forth the Medical Board's reasoning for concluding that petitioner is not disabled from performing police work. Despite the consistent findings concerning petitioner's back and neck issues and petitioner's presentation upon physical examination, the Medical Board stated its determinations in conclusory terms without including in an evaluation of the evidence presented or an adequate explanation for the reason for its denial. In denying petitioner's ADR and ODR applications, it is unclear from the record whether the Medical Board disagreed with petitioner's health care providers, did not consider the conditions described

to be disabling, or found that the petitioner's medical conditions were caused by something other than his line-of-duty accident. Since the Medical Board has not adequately articulated the reasoning behind its determination, this Court is deprived of an adequate record upon which to determine whether the Medical Board's determination or the Board of Trustees's affirmance of that determination has a rational basis or is arbitrary and capricious. Accordingly, the matter must be remanded to the Medical Board to make a new determination which delineates its medical conclusion and adequately articulates the reasoning behind its determination.

***Conclusion***

In view of the above, it is hereby

**ORDERED and ADJUDGED** that the petition is granted to the extent of annulling the findings of the Medical Board and the Board of Trustees with respect to the disapproval of petitioner's application for ADR and ODR; and it is further

**ORDERED and ADJUDGED** that the petition is granted to the extent of directing that the Medical Board conduct a further evaluation of petitioner's application for ADR and ODR and issue an expanded determination on the subject applications, and upon issuance of an expanded determination, the Medical Board shall present the expanded determination to the Board of Trustees; and it is further

**ORDERED** that the remainder of the petition is otherwise denied.

This constitutes the decision, order and judgment of the Court.

**DATED:** March 19, 2010

ENTER,



**O. PETER SHERWOOD**  
J.S.C.

**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 1475).