

Matter of Jacoby v Kelly
2010 NY Slip Op 30692(U)
March 25, 2010
Supreme Court, New York County
Docket Number: 114151/2009
Judge: Eileen A. Rakower
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.

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

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Jacoby, Robert

INDEX NO. 114151/09

- v -

MOTION DATE _____

Kelly, Raymond

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

~~1-2~~
1-3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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 5125).

Dated: 3/25/2010

[Signature]
HON. EILEEN A. RAKOWER

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):

be filed on Petitioner's behalf and that the Medical Board examine Petitioner to determine whether he was disabled from performing police duties.

The Medical Board first reviewed Petitioner's ADR application on October 26, 2007. The Medical Board noted that the doctors who treated Petitioner after his stroke reported that Petitioner had a patent foramen ovale ("PFO").¹ In a letter dated June 6, 2007, Dr. Glenn Waldman, a Board Certified Neurologist, noted that "[Petitioner's] diagnostic workup is positive for [PFO] identified on TEE [transesophageal echocardiogram] and this is likely the source of his stroke." Another doctor who examined Petitioner, Dr. Robert J. Sommer, noted that "there is clear evidence linking [PFO] to stroke," in the course of assessing Petitioner's treatment options going forward. The Medical Board also noted that Petitioner disclosed no history of hypertension upon interview, and that his physical examination by the Medical Board revealed normal heart activity. Based on the foregoing, the Medical Board concluded that the cause of Petitioner's stroke was the congenital abnormality in his heart.

The Board of Trustees remanded Petitioner's ADR application on two occasions for consideration of new evidence. The new evidence submitted by Petitioner consisted of an October 25, 2008 note from Dr. Peter Birkitt, a psychiatrist. Dr. Birkitt opined that Petitioner's stroke could have been caused by either physical or psychological stress. In its final meeting, the Medical Board upheld its previous recommendation that Petitioner be awarded ODR and denied ADR, finding that "the stroke which the officer suffered is related to his congenital anomaly and not related to his work as a New York City Police Officer."

On June 10, 2009, the Board of Trustees voted on Petitioner's ADR application. The result was a tie vote of 6-6 which, pursuant to *City of New York v. Schoeck*, 294 N.Y. 559 [1945], results in the applicant being awarded ODR. This petition ensued. Petitioner claims that he is entitled to the greater benefit pursuant to General Municipal Law §207-k ("the Heart/Stroke Bill"). The Heart/Stroke Bill provides a presumption to police officers who successfully passed a physical

¹The foramen ovale allows for the flow of blood from the right atrium to the left atrium for proper fetal circulation between the left and right atria of the heart, and typically seals shut in the first years of life. However, in a significant amount of individuals, the foramen ovale does not seal shut, allowing for blood to flow between the right and left atria. This is known as a patent foramen ovale.

examination upon entry into police service that a stroke which results 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.”

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 if 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” (*Meyer v. Bd. of Trs. of New York City Fire Dep't*, 90 N.Y.2s 139, 148 [1997]).

Where, as here, the retiree has been awarded ODR as a consequence of a tie vote of the Board of Trustees,

a reviewing court may only disturb such finding if it determines as a matter of law that causation is established, i.e., that the disability was the natural and proximate result of a line-of-duty accident. Respondent's

determination must stand if the record contains any credible evidence of lack of causation

(Picciurro v. Board of Trustees of the N.Y. City Police Pension Fund, Art. II, 46 A.D.3d 346, 348 [1st Dept. 2007]) (citations omitted).

Here, the Court finds credible medical evidence which is sufficient to rebut the presumption of the Heart/Stroke Bill. There was ample medical evidence in the record for the Medical Board to rationally conclude that Petitioner's stroke was the result of his PFO - a congenital heart condition, and not caused by work-related stress. This included among other things, Dr. Waldman's finding that the PFO was "likely the source of his stroke." Petitioner has at best introduced evidence of conflicting medical opinion. However, as the Court notes above, it is well settled that the resolution of conflicts of medical opinion is committed solely to the discretion of the Medical Board, and thus requires deference from the Court.

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: March 25, 2010


EILEEN A. RAKOWER, 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 1212).