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

JANE S. SOLOMON

PART 55

Justice

Index Number : 108120/2009

HOWARD, KATHLEEN

VS.

KELLY, RAYMOND

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 108120-09

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 ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum decision and 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 141B).

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

Dated: 4/6/10

JANE S. SOLOMON 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 55

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In the Matter of the Application of

KATHLEEN HOWARD,

Petitioner,

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

Index No. 108120/09
DECISION AND ORDER

-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, THE NEW YORK CITY POLICE DEPARTMENT and THE CITY OF NEW YORK,

Respondents.

Jane S. Solomon, J.:

In this Article 78 proceeding, petitioner Kathleen Howard seeks a judgment annulling the action of 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 (Board of Trustees), the New York City Police Department and the City of New York (collectively, respondents), which denied her request for accident disability retirement (ADR) pursuant to Administrative Code of the City of New York (Administrative Code) § 13-252, and ordering respondents to retire petitioner with ADR. In the alternative, petitioner requests that the court remand the matter to respondents. Petitioner also seeks an order, pursuant

to CPLR 2307 (a), directing respondents to serve and file all materials in connection with the petitioner's claims.

Respondents seek dismissal of the petition, and contend that they acted reasonably, lawfully and properly in denying petitioner an ADR. Respondents concede that petitioner is too disabled to perform her duties as a police officer. Therefore, the only issue that remains is whether her disability is due to a "line of duty" injury.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner was appointed to the uniformed force of the New York City Police Department (NYPD) in April 1990, and became a member of the Police Pension Fund (PPF) shortly thereafter. On May 23, 2006, while on duty at a security desk inside a police department facility, petitioner reached to catch a falling message board[1] and felt a twinge in her neck (Petitioner's Ex. B). At the time, she experienced no pain and did not report the incident (Petitioner's Ex. C, ¶ 2). Over the next few days, she started to develop pain in her neck and right arm, along with numbness in her right hand (Id.).

On May 26, 2006, petitioner saw a chiropractor. On May 30, 2006, petitioner sought treatment from Thomas Mango, M.D., an orthopedic surgeon, and also received an MRI. During questioning

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[1] Sometimes also referred to in the records as a "bulletin board."

by Dr. Mango, petitioner remembered reaching for the message board, and deduced that this caused her injury (Petition, ¶ 9, and Ex. C).

On June 6, 2006, petitioner received the results of her MRI, which revealed two herniated disks (Petitioner's Ex. D). After receipt of the MRI, Dr. Mango filled out a treating physician's report, indicating that Petitioner suffered from a "herniated nucleus pulposus" and advised the NYPD that petitioner would need physical therapy, pain medication, possible surgery, and would not be able to return to work at that time (Respondents' Ex. 15). Petitioner then submitted her line of duty accident report, dated June 9, 2006, referencing the message board incident (Petitioner's Ex. B). NYPD approved further medical treatment as related to a line of duty accident (Petitioner's Ex. E).

Petitioner was seen by several specialists, including a neurologist and spinal and orthopedic surgeons. On July 14, 2006, petitioner saw Patrick O'Leary, M.D., a spine surgeon. Dr. O'Leary examined her and recommended surgery. On September 6, 2006, he performed spinal surgery on petitioner for the herniated disks in her neck.

On August 9, 2007, petitioner filed an application for ADR. Respondents note that petitioner "failed to identify her

May 23, 2006 injury as the cause of her neck problems" (Verified Answer, ¶ 7), although she did mention the May 23 incident in her initial injury report (Petitioner's Ex. B).

In addition to petitioner's application for ADR, the Police Commissioner filed an application on petitioner's behalf for Ordinary Disability Retirement (ODR).

A. Medical Board's First Review:

The Medical Board of the Police Pension Fund (Medical Board) first interviewed petitioner and considered her application for ADR on September 26, 2007 (Petitioner's Ex. J). The Medical Board reviewed petitioner's file, which consisted of medical reports and letters dated June 2006 through September 2007. The Medical Board interviewed the petitioner, and also performed an examination which consisted of noting that the "officer had a well-healed transverse scar on the right anterior portion of the neck" (*Id.*, ¶ 25). The Medical Board explains that "[n]o other examination was performed due to the difficulty in ascertaining the status of her fusion" (*Id.*).

The Medical Board recounted a letter dated September 18, 2007, from Dr. Edward Rachlin, who is Dr. O'Leary's partner, and is also an orthopedic spine surgeon. Dr. Rachlin, who observed and treated petitioner before and after her surgery, wrote that "the officer should not return to full police duty" (*Id.*, ¶ 23).

At the end of the evaluation, the Medical Board agreed that petitioner should not return to her duties as a police officer. It approved the police commissioner's application for ODR and denied petitioner's application for ADR, concluding:

> "[T]he MRI findings of June 6, 2006 and the two-level fusion of September 6, 2006, which are suggestive of chronic degenerative changes, were not caused by an episode of reaching forward for a falling bulletin board. In addition the Medical Board notes the significant time delay from the time of the incident as described on May 23, 2006 and the need for a two-level fusion, which is the reason for her disability . . . ."

(*Id.*, ¶¶ 26, 27).

B. Medical Board's Second Review:

After receipt of the Medical Board's first determination, Dr. Rachlin submitted a letter dated October 25, 2007 on the petitioner's behalf, stating, "The above-referenced patient's injury and resulting surgery were causally related to the line of duty injury that occurred on May 23, 2006." (Petitioner's Ex. K). Dr. Rachlin then followed up with another letter, dated February 9, 2008, which further described her condition (Petitioner's Ex. L).

After receipt of this "new evidence," the Board of Trustees remanded petitioner's application to the Medical Board for further review. The Medical Board reviewed Petitioner's application for ADR for the second time on February 20, 2008. Before making its determination, it reviewed both letters submitted by Dr. Rachlin. Subsequently, the Medical Board

determined that her injury is "the result of arthritis and not from one episode where one reaches with an outstretched arm to catch a falling board" (Petitioner's Ex. M, ¶ 6). The Medical Board reaffirmed its previous decision to deny Petitioner's application for ADR. *Id.*

C. Medical Board's Third Review:

On June 25, 2008, Dr. Rachlin submitted a letter, signed also by Dr. O'Leary, in which he details the causality between the incident on May 23, 2006, and the petitioner's disability. The doctors also indicate that, in their opinion, there was not a significant time delay between the time of the incident and the time that the petitioner reported her complaints. In conclusion Dr. Rachlin writes:

> "The presence of degenerative changes . . . does not rule out the aggravation of the pre-existing condition in a patient who is asymptomatic without prior problems . . . .
>
> The history as noted would lead one to the opinion that the patient's work related accident was the cause of her symptom and the need for anterior cervical fusion."

(Petitioner's Ex. N).

On September 3, 2008, in light of this "new evidence," the Board of Trustees again remanded petitioner's case to the Medical Board for further review.

The Medical Board again denied petitioner's application for ADR. In a letter dated August 11, 2006, the Medical Board, through one of its surgeons, asked Dr. O'Leary whether the injury

on May 23, 2006 caused Petitioner's condition. Dr. O'Leary responded with a hand-written notation stating "I do not know." (Respondents' Ex. 38).

On December 3, 2008, petitioner submitted to the Board of Trustees a letter from Dr. O'Leary to petitioner's attorney. In the letter, Dr. O'Leary writes:

> Correspondence with the NYPD doctor asking whether Mrs. Howard's spinal condition was related to her line of duty accident. I answered that I do not know. Concerning Mrs. Howard's spine injury related to her line of duty instance is explained in Dr. Rachlin's communication of June 25, 2008. I do not see the necessity for my signature to also be present with Dr. Rachlin's. This is not the practice is my office. Dr. Rachlin has been overseeing these matters on my behalf and I have full confidence in Dr. Rachlin's findings and his capacity to deal with these matters as outlined in his letter.

(Petitioner's Ex. Q).

Thereafter, on February 11, 2009, the Board of Trustees adopted the Medical Board's recommendation with a tie vote, and disapproved petitioner's ADR application (Minutes of the Board of Trustees Meeting, Petitioner's Ex. U).

On or around June 11, 2009, petitioner filed this Article 78 petition.

DISCUSSION

Similar to other city pension funds and retirement systems, there is a two-step process when a member of the police force pursues retirement based on accidental disability

(Administrative Code § 13-252; *see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). First, the petitioner must be examined by a Medical Board which determines whether the applicant is physically or mentally incapacitated for duty. The Medical Board is the sole determiner of whether the applicant is injured and whether this disability prevents the applicant from performing his duties (*Id.* at 760). Second, if the applicant is deemed 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. This second step only occurs if the Medical Board finds that the applicant is disabled (Id.). Causality is the only issue in this case, since the Medical Board determined that petitioner is disabled.

In an Article 78 proceeding challenging the disability determination, the Medical Board's finding will be sustained unless it lacks rational basis, or is arbitrary or capricious. (*See Matter of Borenstein*, 88 NY2d 756, *supra*). "Ordinarily, a Medical Board's disability determination will not be disturbed if the determination is based on substantial evidence. While the quantum of evidence that meets the 'substantial' threshold cannot be reduced to a formula, in disability cases the phrase has been construed to require 'some credible evidence'" (*Id.* at 761). Credible evidence has been generally defined as "evidence that

proceeds from a credible source and reasonably tends to support the proposition for which it is offered . . . [and] must be 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] [citation omitted]). When conflicting medical opinions are presented, the Medical Board's opinion takes precedence (*Matter of Borenstein*, 88 NY2d at 760). Where, as here, the determination of the Board of Trustees has resulted in a tie vote, the court may not disturb the final award, "as long as there was any credible evidence of lack of causation before the Board of Trustees . . . ." (*Matter of Meyer*, 90 NY2d at 145). "The denial of accidental disability benefits in consequence of the tie vote can be set aside on judicial review only if the courts conclude that the retiree is entitled to the greater benefits as a matter of law" (*Canfora v Bd of Trustees*, 60 NY2d 347, 352 [1983]).

A. Petitioner's 1991 Line Of Duty Injury

In an argument presented for the first time in her memorandum of law, petitioner alleges that her disability may be related to a 1991 incident in which she was punched in the face by a perpetrator. Despite the fact that petitioner reported no neck problems after this injury, she also denied any neck or back problems since 1991 except for back pain during pregnancy. It

is well settled that "[j]udicial review of administrative determinations is confined to the facts and record adduced before the agency" (*Matter of Rizzo v New York State Division of Housing and Community Renewal*, 6 NY3d 104, 110 [2005] [internal quotation marks omitted]). During her interviews with the Medical Board, petitioner did not claim that any causal relationship existed between the 1991 encounter and her present condition. Neither the Medical Board, nor the court, need address evidence that was not produced at the time of the Medical Board's determination.

B. Petitioner's Alternative Theory of Causation

Petitioner here presents an alternative theory, that the May 23, 2006 incident "played a contributory role in her disability," entitling her to ADR. Petitioner is referring to a standard created by the Court in *Matter of Tobin v Steisel* (64 NY2d 254, 259 [1985]), that "an accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury."

There are two problems with this theory. First, as with the 1991 event, petitioner did not claim in her application for ADR benefits that the 2006 event may have aggravated a pre-existing condition. As a result, the Medical Board was not required to address this claim, and the court is limited to the evidence presented at the time of the determination.

Second, although petitioner's lawyer wrote a letter to

the Board of Trustees on July 8, 2008, referencing the possibility of a *Tobin v Steisel* scenario, she provided no evidence in support. As the court in *Matter of Evans v City of New York* (145 AD2d 361, 361 [1st Dept 1988]) held, "it is the applicant for accident disability retirement who has the burden of establishing that the disability is causally connected to a line-of-duty accident." If a latent condition was exacerbated in 2006, Petitioner was responsible to produce relevant medical evidence to the Medical Board. The Medical Board has no obligation to investigate or determine the cause of a disability (*Id.* at 362).

The issue is not whether petitioner suffered an injury, but whether it resulted from the May 23, 2006 incident. The medical evidence shows that she had a degenerative condition. Dr. Rachlin wrote that, even if the condition was not caused by the May 23 incident, the problem was previously asymptomatic, which "would lead one to the opinion that the patient's work related accident was the cause of her symptom and the need for anterior cervical fusion" (Petitioner's Ex. N). Dr. O'Leary wrote that he did not know if the condition he treated was caused by the May 23, 2006 event, and when pressed for an opinion by petitioner's attorney in October 2008, he referred to Dr. Rachlin's correspondence (Petitioner's Ex. Q).

C. CPLR 2307

CPLR 2307 is addressed to the manner in which a subpoena duces tecum is served on a library, or a department or bureau of a municipal corporation, or of the state, and compliance therewith. Since both parties submit medical records, and petitioner makes no mention in her petition or reply that she lacks her own records, it appears this is a moot issue.

CONCLUSION

In view of the above, it hereby is

ORDERED and ADJUDGED that the petition is denied, and the proceeding is dismissed.

Dated: April 6, 2010

ENTER:

J.S.C.