

Matter of Roldan v Kelly
2010 NY Slip Op 30799(U)
April 5, 2010
Supreme Court, New York County
Docket Number: 112763/09
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PART 55

Index Number : 112763/2009

Justice

ROLDAN, ROBERT

vs.

KELLY, RAYMOND, AS POLICE COMM.

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 112763-09

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).

Dated: 4-5-10

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
COUNTY OF NEW YORK: IAS PART 55

-----X
In the matter of application of

ROBERT ROLDAN,

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

Index No.: 112763/09
DECISION & 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, NEW YORK CITY POLICE DEPARTMENT and
THE CITY OF NEW YORK,

Respondents.

-----X
Jane Solomon, J.:

In this Article 78 proceeding, petitioner Robert Roldan, a former police detective of the New York City Police Department (NYPD) seeks a judgment reviewing and annulling the action of 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 (Board of Trustees), the Board of Trustees, the NYPD and the City of New York (the City) in connection with the designation of his pension benefits. Respondents denied petitioners' application for a line-of-duty accident disability retirement (ADR) pension pursuant to the Administrative Code § 13-252 and the General Municipal Law (GML) § 207-k, commonly referred to as the Heart Bill. Petitioner

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seeks an upgrade of the ordinary disability retirement (ODR) pension that he receives to an ADR pension under the Heart Bill, and an order directing respondents to reconsider his application.

Petitioner further seeks an order, pursuant to CPLR 2307(a), ordering respondents to serve and file all documents submitted to the Board of Trustees in connection with his retirement, as well as copies of all medical records relating to him which are on file with the Article II Pension Fund or NYPD.

Background

Petitioner joined the NYPD on April 30, 1991. When he began his employment, he passed all physical examinations and was qualified as physically fit. Petitioner claims that in 1994 he began to develop hypertension, commonly known as high blood pressure.

In April 2003, petitioner was taken to the emergency room for complaints of chest pain. At that time, his blood pressure was taken and recorded as 120/80, considered normal, and he was diagnosed with cardiomyopathy, a weakening of the heart muscle. In February 2006, petitioner suffered chest pain while in pursuit of a perpetrator. He was taken to the hospital where his pressure was recorded as 151/103. He had a cardiac catheterization and it was noted that he suffered "severe left ventricular systolic dysfunction" (see St. Luke's Roosevelt Hospital - Hospital Summary for Cardiac Patients with Chest

Pain/Heart Failure, dated March 2, 2006, Verified Answer, Ex. 22). He required a defibrillator and biventricular pacemaker. Petitioner was placed on restrictive duty. Thereafter, his left ventricular readings were mild to moderate.

In November 2006, petitioner submitted an application for ADR under the Heart Bill, for his heart condition. Respondents' Medical Board evaluated petitioner's application on April 27, 2007, and concluded that, while petitioner has a history of an abnormal electrocardiogram preceding 2003, there was no finding showing left ventricular hypertrophy and, further, petitioner had "mostly normal blood pressure and his left ventricular ejection fraction has improved under treatment" (see Verified Petition, Ex. H). The Medical Board stated that the "final diagnosis is Cardiomyopathy" and recommended that ODR be granted (*id.*).

The matter was taken to the Board of Trustees, wherein the Medical Board was asked to reconsider the type of disability pension petitioner would receive "based on the presence of antecedent hypertension" as urged by petitioner (see Verified Petition, Ex. I).

On January 11, 2008, the Medical Board reviewed Petitioner's additional evidence, interviewed and performed a physical examination (*id.*). The evidence reflected that, from 1994 to 1997, petitioner had five elevated blood pressure

readings ranging from 142/88 to 149/84. All five readings were taken at times petitioner was brought to the hospital for various work-related injuries, which were specifically delineated in the Medical Board's determination (*id.*).

In addition, the Medical Board reviewed a November 11, 2002 medical report advising Petitioner to have his physician check his blood pressure; a letter dated October 12, 2007 from his physician, Dr. Duccio Baldari (Baldari), explaining Petitioner's heart condition; and a letter dated October 24, 2007, from Baldari expressing that Petitioner suffered from hypertension as early as 1994 and that his heart ailments were work related (see Verified Petition, Ex. I).

After a review of the supplemented record, the Medical Board determined that the elevated blood pressure readings, taken at times when petitioner was injured, were not representative of what his resting average blood pressure would have been at those times (*id.*). The Medical Board also considered that petitioner had not received any treatment for hypertension until 2003, after petitioners's cardiomyopathy (*id.*). The Medical Board reaffirmed its previous decision and recommended ODR (*id.*).

For a third time, on a second remand, petitioner appealed to the Medical Board for reconsideration (see Verified Petition, Ex. L). Petitioner presented two more reports from his physicians, Drs. Edwin R. Roman and Baldari, both of whom

represented that petitioner suffered from hypertension as early as the mid-1990s (*id.*). Petitioner was again interviewed and examined. The Medical Board noted "that the accepted definition of hypertension/Grade I ("mild") requires readings of 140-159 systolic, 90-99 diastolic" (*id.*). It reaffirmed its previous decision because "there is no evidence that the detective had hypertension preceding the findings of impaired left ventricular function" (*id.*).

On February 9, 2009, petitioner's counsel wrote to the Board of Trustees, requesting an upgrade of his disability pension to ADR (see Verified petition, Ex. M). Petitioner's counsel advised that the Medical Board incorrectly defined hypertension, in that high blood pressure stage 1 is listed as 140-159 systolic OR 90-99 diastolic and that pre-hypertension is listed as 120-139 systolic or 88-89 diastolic (*id.*). In addition, he noted that the emergency room readings taken in the mid-1990s were taken long after the accidents/ injuries and so, cannot be said to have been high readings because of the pain or stress of the situations.

According to the May 13, 2009 meeting minutes, the Board of Trustees concluded that "after considering the evidence, it's clear to us that this does not qualify under the heart bill and we're not inclined to upgrade and we're ready to vote on it" (see Verified Petition, Ex. O). The Board of Trustees voted 6/6

for ADR; as a result, petitioner was placed on ODR (*id.*).

Petitioner retired. He now appeals to this court for annulment of respondents' determination.

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 (*Matter of Borenstein v New York City Empls. Retirement Sys.*, 88 NY2d 756 [1996]). Determining whether a retiring or retired police officer is entitled to ADR is a two-step process (*id.* at 760). The Medical Board must first determine whether the officer is unable to physically or mentally perform his or her job (*id.*). Then, if there is finding that the officer is disabled, the Medical Board must make a recommendation to the Board of Trustees as to whether the disability was a natural and proximate result of the injury (*id.*).

As long as the Medical Board's determination is based on some credible evidence, it should not be disturbed (*Matter of Borenstein*, 88 NY2d at 760; *Matter of Canonico v Kelly*, 38 AD3d 444 [1st Dept 2007]). Where the medical evidence is conflicting, it is the sole province of the Medical Board to resolve the conflict (*Matter of Borenstein*, at 760; *Matter of Bailey v Kelly*, 11 AD3d 208 [1st Dept 2004]). Reviewing courts may not weigh the medical evidence or substitute their judgment for that of the

Medical Board (*Matter of Borenstein*, at 760).

In addition, where, as here, 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 Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y.*, Art. II, 60 NY2d 347, 351-52 [1983]; *see also Matter of Barbour v Kelly*, 26 Misc 3d 1212 (A) [Sup Ct NY County 2010]).

Petitioner contends that he is entitled to ADR, pursuant to Administrative Code § 13-252 and the Heart Bill.

Administrative Code § 13-252 provides that a NYPD member who is "physically or mentally incapacitated from the performance of city-service, as a natural and proximate result of such city-service ... such member should be retired" with ADR.

The Heart Bill creates a presumption that a disabling or fatal heart condition "suffered by a New York City police officer or fireman was accidentally sustained as a result of his employment if not rebutted by contrary proof" (*Uniformed Firefighters Assn., Local 94, IAFF, AFL-CIO v Beekman*, 52 NY2d 463, 471 [1981]; *see also GML § 207-k*).

This presumption is not rebutted when a heart disability results from coronary artery disease, ischemic heart disease or hypertensive heart disease (*see Matter of Hutnik v*

Kelly, 37 AD3d 346 [1st Dept 2007]; *Matter of McCarthy v Board of Trustees of the N.Y. City Police Pension Fund, Art. II*, 306 AD2d 156 [1st Dept 2003]; *Matter of Collins v Kelly*, 2008 NY Slip Op 30887 (U) [Sup Ct NY County 2008]).

The presumption is rebutted where the Medical Board opines, based on competent evidence, that the disabling condition is not job-related or caused by stress, or, that there are no findings of stress-related pathology, such as related hypertension (see *Matter of Goldman v McGuire*, 101 AD2d 768 [1st Dept 1984], *affd* 64 NY2d 1041 [1985]; *Matter of DeMonico v Kelly*, 49 AD3d 265 [1st Dept 2008]).

According to the most recent case law in the First Department, when a petitioner claims to have suffered from coronary disease in conjunction with hypertension, one of the following conditions must be present: (1) the high blood pressure must be a cause of the condition (*Matter of Barbour*, 26 Misc 2d 1212 (A) [presumption rebutted where Medical Board determined that petitioner's hypertension did not cause his atrial fibrillation]); or (2) a history of hypertension, not just of recent origin (see *Matter of DeMonico*, 49 AD3d 266 [presumption rebutted where Medical Board determined that the petitioner had no history of hypertension]; *Matter of Knorr v Kelly*, 35 AD3d 326 [1st Dept 2006] [presumption rebutted where ample medical evidence showed that petitioner's hypertension was of recent

origin].

Arguments that hypertension is not severe are insufficient to rebut the presumption (see *Matter of McCarthy v Board of Trustees*, Index No. 19944/01 at *4 [Sup Ct NY County, Nov. 25, 2002], *affd* 306 AD2d 156, *supra*). However, even where there is conflicting evidence as to whether hypertension exists, and to what extent, the Medical Board's determination will be upheld (see *Matter of Hutnik*, 37 AD3d 346; *Matter of Burns v Safir*, 305 AD2d 142 [1st Dept 2003]).

Based on a review of the record, it cannot be said that the Medical Board did not consider competent evidence when making its determination. Here, in rendering its final determination, the Medical Board interviewed and physically examined petitioner on more than one occasion and, in reaching its decision, discussed in detail all of the medical evidence it considered (see *Matter of Meyer v Board of Trustees of the N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139 [1997]). Moreover, there is nothing in the record to suggest that the Medical Board made its determination based on an improper definition of hypertension. The Medical Board determined that the elevated pressure readings prior to 2003 were occasions where petitioner suffered from various injuries and infections. In addition, no medication had been prescribed for high blood pressure prior to 2003.. Finding that the Medical Board's determination was not

arbitrary or capricious, based on the competent evidence submitted by petitioner, as well as its independent evaluation of petitioner, the court must give deference to its determination (*Matter of Hutnick*, 37 AD3d 346). Accordingly, the Board of Trustee's decision may not be set aside, and the petition is denied.

Regarding petitioner's second request, 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 respondents submit medical records, and petitioner makes no mention in his petition or reply that he lacks his own records, and makes no allegation that respondents' records are incomplete, it appears that this issue is moot.

In view of the above, it hereby is

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

Dated: 4-5-10

ENTER:



J. S. C.
JANE S. SOLOMON

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