

Matter of Hogg v Kelly
2010 NY Slip Op 31016(U)
April 20, 2010
Sup Ct, NY County
Docket Number: 112839/09
Judge: Joan B. Lobis
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: San B. Lolis
Justice

PART 6

Index Number : 112839/2009
HOGG, DANIEL
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 2/5/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-14
15-39

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

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

UNFILED DOCUMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served issued hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/20/10

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
DANIEL HOGG,

Petitioner,

Index No. 112839/09

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

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).

Respondents.

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

Petitioner Daniel Hogg 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 ("ADR") allowance and granted him Ordinary Disability Retirement ("ODR"). In addition, petitioner seeks production of certain records pursuant to C.P.L.R. § 2307(a). 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"). The branch of the petition seeking production is moot based on the documents annexed to respondents' papers. For the reasons stated below, the petition is denied.

Petitioner Daniel Hogg joined the NYPD on July 7, 1999. Prior to his appointment he passed all physical and mental examinations administered by the NYPD. At all times material herein,

petitioner has been a member of the NYPD. As part of his duties, petitioner was assigned to rescue, recovery and clean-up operations at the World Trade Center in the aftermath of the terrorist attacks on September 11, 2001. He alleges that this assignment led to a stroke he suffered on January 7, 2007 at the age of 34. Petitioner was taken to the emergency room of the Nyack Hospital that morning and subsequently transferred to Westchester Medical Center. His symptoms included a facial droop along his left side as well as left sided paralysis. He was treated by Steven J. Marks, M.D. An MRI confirmed the stroke. Petitioner was discharged on January 9, 2007. Work-ups of petitioner revealed a patent foramen ovale ("PFO") and atrial septal aneurysm, both congenital defects. A PFO is a small hole between the two upper chambers of the heart. An atrial septal aneurysm is a congenital cardiac abnormality characterized by oscillation and aneurysmal bulging of the atrial septal tissue. Petitioner continues to have left side weakness and he complains of some cognitive difficulties affecting his memory.

Petitioner first applied for ADR on June 14, 2007, requesting benefits under General Municipal Law § 207-k, commonly referred to as the "Heart Bill." The law provides that police officers and firefighters seeking disability payments, who entered service without any signs of disabling cardiac conditions, shall have the benefit of a presumption that certain conditions leading to the heart attack or stroke arose from performance of their duties. The presumption can be overcome by competent evidence.

Petitioner's application was reviewed by the Medical Board on September 28, 2007. The Medical Board unanimously recommended ODR, but disapproved ADR for petitioner. On February 13, 2008, the PPF remanded petitioner's application back to the Medical Board, because petitioner submitted additional documents supporting his application. Upon reconsideration, the Medical Board reaffirmed its

denial. On August 13, 2008, the PPF again remanded the application to the Medical Board. On October 24, 2008, the Medical Board rejected petitioner's application for ADR for a third and final time. After inaction by the PPF at meetings on March 11, 2009 and April 8, 2009, the PPF denied petitioner's application on May 13, 2009. It is from that determination that petitioner seeks relief.

In support of his application, petitioner offered medical records and letters from his treating neurologist, Stephen J. Marks, M.D., Director of the Stroke Center at Westchester Medical Center, and Jorge Kizer, M.D., a board certified internist who performed an echocardiogram on March 23, 2007, at New York Presbyterian Hospital. The papers also contain the report of a transesophageal echocardiograph performed on January 16, 2007, by Andrew Kupersmith, M.D., of Cardiology Consultants of Westchester. Dr. Kizer's report mentions that the stroke was associated with petitioner's "large PFO." According to a letter to the NYPD from Dr. Kizer, dated July 11, 2007, "[petitioner] sustained an ischemic stroke of indeterminate etiology (cryptogenic embolism) albeit one associated with a large patent foramen ovale and actual septal aneurysm." Dr. Kizer went on to write that "[a]lthough we cannot prove that the stroke was a paradoxical embolism across his PFO, the high-risk features of his interatrial septal findings make a presumptive diagnosis of paradoxical embolism a leading explanation for his stroke." In its September 28, 2007 denial, the Medical Board cited Dr. Kizer's report and letter as evidence that petitioner's stroke was due to a congenital abnormality. Subsequent submissions to the Medical Board by John Arthur McClung, M.D., a member of the Division of Cardiology of Westchester Medical Center, as well as Drs. Marks and Kizer disputed the causation of the stroke. Dr. McClung set forth that there was a statistical likelihood that the stroke was related to the amount of time petitioner spent on his feet as a police officer. Dr. Marks asserted that there was no exact cause of the stroke and noted that PFOs are benign in most

individuals. A later submission offered articles that supported the contention that people with PFOs are at no higher risk of stroke than other people. Dr. Kizer argued that other factors, like the stress of the duties of a police officer, should be considered as an explanation for petitioner's stroke in addition to the atrial septal aneurysm. The Medical Board continuously rejected the argument that standing or stress and strain contributed to the stroke. They adhered to the opinion that the congenital defect of the interatrial septum and the PFO likely had caused the stroke.

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 a stroke, General Municipal Law § 207-k provides for a presumption in favor of accidental line of duty causation as long as the applicant "successfully passed a physical examination on entry into the service of such respective department, which examination failed to reveal any evidence of such condition . . . unless the contrary be proved by competent evidence."

"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." 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 that petitioner's stroke was not caused in the line of duty was rationally based on sufficient evidence. The Medical Board adequately rebutted the presumption in General Municipal Law § 207-k by relying on petitioner's own treating physician, Dr. Kizer, who opined that petitioner's congenital defects were the most likely cause of his stroke. The denial was not arbitrary or capricious or lacking a rational basis.

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

Dated: April 20, 2010



 JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
 This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).