

Matter of Collins v Kelly
2010 NY Slip Op 31017(U)
April 23, 2010
Sup Ct, NY County
Docket Number: 114153/09
Judge: Jane S. Solomon
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4-26-10

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

JANE S. SOLOMON

PART 55

Index Number : 114153/2009

COLLINS, DWIGHT

VS.

KELLY, RAYMOND

SEQUENCE NUMBER : # 001

ARTICLE 78

Justice

INDEX NO. 114153-09

MOTION DATE 2/26/10

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1-3
4-5

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this motion petition 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 issued hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1410).

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

Dated: 4/23/10



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

DWIGHT COLLINS,

Petitioner,

Index No.:

~~112763709~~

114153109

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

- 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 Dwight
Collins, a former sergeant of the New York City Police Department
(NYPD), seeks a judgment reviewing and annulling the
determination 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 his petition for a line-of-duty
accident disability retirement (ADR) pension, pursuant to the
Administrative Code of the City of New York (Administrative Code)
§ 13-252 and the General Municipal Law (GML) § 207-k, commonly

referred to as the Heart Bill, and awarded him a non-line-of-duty ordinary disability retirement (ODR). Petitioner also seeks an upgrade of his pension award.

Background

Petitioner joined the NYPD on July 5, 1989. When he began his employment with the NYPD, he passed all physical examinations, which qualified him as physically fit.

Beginning in 2001, petitioner began to experience shortness of breath. Tests revealed a block in petitioner's heart. As a result, on November 19, 2001, petitioner was implanted with a pacemaker. In April 2002, petitioner again complained of shortness of breath. A pressure reading indicated his blood pressure was 140/84 (see Medical Board Memo to Board of Trustees dated December 17, 2004, Notice of Petition, Ex. G), and on April 30, 2002, a defibrillator was implanted in petitioner's heart.

Petitioner was placed on restrictive duty in August 2003. On December 17, 2004, he was examined by the Medical Board to determine his eligibility for ODR until his retirement, which was approved due to his pacemaker and defibrillator. The Board of Trustees concurred. On March 2, 2005, petitioner applied for ADR, claiming that he suffered from heart disease, which led to the implantation of a pacemaker and defibrillator.

Due to an alleged lack of communication with

petitioner, the pension fund advised that it was unable to process his ADR application, and requested that he make an appointment with the medical board for an examination. From November 4, 2005 through November 2, 2006, petitioner underwent a series of examinations and medical tests. On February 23, 2007, the Medical Board determined, based on its examinations of petitioner and his medical records, that the "defects that he had were not related to hypertension" and recommended approval of ODR. The Board of Trustees, by a vote of six to six, approved the Medical Board's determination.

On January 7, 2008, petitioner appealed for annulment of respondents' determination (*In the Matter of Application of Dwight Collins v Raymond Kelly, et al.*, Index No. 100297/08). By decision/order dated March 27, 2008, the Honorable Carol R. Edmead remanded the matter to respondents, finding that they failed to "sufficiently rebut the presumptions of the Heart Bill ... as to the presence of hypertension" (see Notice of Petition, Ex. L). The court pointed to evidence of the medical report of Dr. Raymond Catania, a cardiologist, dated November 1, 2006, which noted the existence of hypertension, as well as April 2002 medical records from Lenox Hill Hospital, which mentioned a history of hypertension. Judge Edmead further found that the Board of Trustees failed to conduct an independent inquiry into the differing opinions between the Medical Board and petitioner's

physician. As such, the court ordered that the Medical Board and the Board of Trustees reconsider, and that the further proceedings "include the specific grounds for its determination" (*id.*).

As directed, on August 22, 2008, the Medical Board reexamined petitioner and reaffirmed its previous decision denying ADR (Notice of Petition, Ex. M). In doing so, the Medical Board stated that it considered whether hypertension had caused petitioner's cardiac problems and found that it did not (*id.*). The Medical Board also considered that petitioner's blood pressure readings from October 30, 2001 to March 2002 were mostly normal (*id.*), with the highest reading described as "physiological, i.e., normal," because it was taken at the peak of exercise (*id.*).

In addition, with respect to the April 2002 Lenox Hill medical records, the Medical Board, while noting that the intake form stated that petitioner had a history of hypertension, relied on the November 20, 2001 and May 13, 2002 discharge forms which made no mention of hypertension (*id.*). It also addressed Dr. Catania's November 2006 letter, wherein he suggested that petitioner had pulmonary hypertension. It explained that pulmonary hypertension is not related to "essential hypertension," which could be invoked as a possible underlying cause of petitioner's heart condition (*id.*), and concluded that

[* 6]

there was no scientific basis for the suggestion that petitioner's heart conditions was due to or could have been caused by hypertension (*id.*). The Medical Board concluded that there was no evidence that he had hypertension preceding the heart disease which could have caused his condition (*id.*).

On February 6, 2009, petitioner's attorney requested that the Board of Trustees remand the case to the Medical Board based on the case law of two New York Supreme Court cases in New York County, *In the Matter of McCarthy v Police Pension Fund*, Index No., 109351/05 (Ramos, J.), and *In the Matter of Goodacre v Raymond Kelly et al.*, Index No. 103789/08 (Schlesinger, J.), to upgrade his disability pension to ADR (Notice of Petition, Ex. N). The matter was remanded, and, on April 17, 2009, the Medical Board reviewed petitioner's case and reaffirmed its previous decision (Notice of Petition, Ex. O). Petitioner now appeals to this court for an annulment of that 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 a 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*, 88 NY2d 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*, 88 NY2d at 760).

The Court of Appeals has held that it is "not arbitrary and capricious for the Board of Trustees to rely upon the Medical Board's recommendation of no causal connection" to an individual's line-of-duty injuries as long as the recommendation is based on credible evidence (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 146 [1997]). 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), 2010 NY Slip Op 50079(U) [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 for the performance of city-service, as a natural and proximate result of such city-service . . . 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, 472-473 [1981]; see also GML § 207-k). The 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 N.Y. City Police Pension Fund*, Art. II, 306 AD2d 156 [1st Dept 2003]).

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 or some coronary disease (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]; *Matter of Vallas v Safir*, 304 AD2d 353 [1st Dept 2003]).

When a petitioner claims to have suffered from coronary disease in conjunction with hypertension, the following conditions must be present: (1) the high blood pressure must be a cause of the condition (*Matter of Barbour*, 26 Misc 3d 1212(A) [Sup Ct, New York County, 2010] [Heart Bill presumption rebutted when Medical Board determined that the 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 at 266 [Heart Bill 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 the hypertension is not severe are insufficient to rebut the presumption (see *Matter of McCarthy v Board of Trustees*, Index No. 109944/01 at *4 [Sup Ct NY County, Nov. 25, 2002], *affd* 306 AD2d 156, *supra*). 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]).

The Medical Board's determination, made pursuant to the February 6, 2009 remand must be upheld. The Medical Board explains the rationale for its decision in its August 22, 2008 recommendation to the Board of Trustees, relying on competent evidence (see Notice of Petition, Ex. M). The Medical Board also interviewed and physically examined petitioner on multiple occasions, and, in rendering its determination, discussed in detail all of the medical evidence it considered (see *Matter of Meyer*, 90 NY2d 139). It then stated that the evidence presented to it did not support the conclusion that petitioner had a history of hypertension which preceded or caused his heart problems (see *Matter of DeMonico*, 49 AD3d at 266).

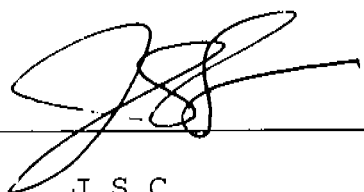
This determination was not arbitrary or capricious and was based on the competent evidence. Therefore, the court must defer to the Medical Board's determination (*Matter of Hutnik*, 37 AD3d 346; *Matter of Burns*, 305 AD2d 142), and the Board of Trustee's decision may not be set aside.

Accordingly, it hereby is

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

Dated: 4/23/10

ENTER:



J.S.C.

JANE S. SOLOMON

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 1418).