

<b>Matter of Paccio v Kelly</b>
2010 NY Slip Op 31124(U)
April 20, 2010
Sup Ct, NY County
Docket Number: 115490/2009
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON Justice

PART 55

Index Number : 115490/2009  
PACCIO, KENNETH  
VS.  
KELLY, RAYMOND  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE 3/15/10  
MOTION BEG. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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 <sup>Petition</sup> motion is decided by the annexed memorandum Decision, Order and Judgment

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

**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: 4/20/10

J.S.  
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 : PART 55**

In the Matter of the Application of  
KENNETH PACCIO,  
Petitioner,

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

INDEX NUMBER 115490/2009

-against-

**DECISION, ORDER &  
JUDGMENT**

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  
OF NEW YORK,

Respondents.

**FILED**  
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  
41B).

**JANE S. SOLOMON, J.:**

Petitioner Kenneth Paccio petitions this court for a judgment pursuant to CPLR Article 78 annulling respondents' denial of an accident disability retirement (ADR) allowance to him and permitting him to retire with an ADR allowance or, in the alternative, remanding petitioner's case to the Board of Trustees of the Police Pension Fund, Article II (the Board of Trustees).

Petitioner joined the New York City Police Department (NYPD) on January 20, 1987 and was a member of and contributor to its pension fund throughout his service until his retirement after the Board denied his application for ADR at the recommendation of the pension fund's medical board.

New York City Administrative Code § 13-251 provides for an ordinary disability retirement (ODR) if "medical examination shows that such [NYPD] member is physically or

[\* 3]

mentally incapacitated for the performance of duty and ought to be retired.” According to Administrative Code § 13-252, ADR is granted if “medical examination and investigation shows that such [NYPD] member is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of wilful negligence on the part of such member.”

“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.’” *Borenstein v New York City Empls. Ret. Sys.*, 88 NY2d 756, 760 (1996) (citations omitted). “The courts may not substitute their own judgment for that of the Medical Board.” *Matter of Seiferheld v Kelly*, 70 AD3d 460, 462 (1st Dept 2010) (internal punctuation omitted). “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.” *Borenstein, supra* at 760.

Petitioner sustained at least two line-of-duty injuries while at NYPD, a “cervical muscle strain” on March 9, 1998 (NYPD injury report, Exhibit A attached to Notice of Petition) and “muscle strain” in his lower back on March 29, 2003 (*Id.*). Both injuries occurred when he was trying to apprehend a suspect. He went to the emergency room of St. Vincent’s Hospital in the first instance and the emergency room of St. Clare’s Hospital in the second. He was not admitted to either hospital. About two years after the latter incident, in April 2005, according to a medical history taken by Stephen D. Burstein, MD, a neurosurgeon whom he consulted on January 11,

[\* 4]

2006 (Exhibit E attached to Notice of Petition), petitioner reinjured his back lifting his newborn son. On January 3, 2006, he visited an orthopedic surgeon, Stephen Borkow, MD, because of back pain that radiated into his right leg, leaving his right foot numb and dropped. The next day, he had an MRI of his lumbar spine, which found disc herniations and degenerations, and annular tears (Exhibit D attached to Notice of Petition), and, on January 11, 2006, he saw Dr. Burstein who recommended near-immediate back surgery (Exhibit E attached to Notice of Petition). Dr. Burstein operated on January 18, 2006 and petitioner remained in the hospital until January 20, 2006. He revisited Dr. Burstein on March 22, 2006 and complained of continuing weakness and numbness of his right foot (Exhibit G attached to Notice of Petition). He had another MRI on June 26, 2006 which observed apparently typical post-operative changes, scarring and minor bulges (Exhibit H attached to Notice of Petition).

Petitioner saw Dr. Burstein again on January 17, 2007, complaining of recurring back pain and discomfort in his right knee and right foot (Exhibit I attached to Notice of Petition). Dr. Burstein described petitioner's condition as "residual neurological deficit" and recommended that he retire if he cannot be limited to desk duty. Petitioner returned to Dr. Burstein on February 21, 2007, because, in addition to the continuing problems with his right foot, he "felt a 'pop' in his back and had some pain in his left hip" (Exhibit J attached to Notice of Petition). Dr. Burstein recorded that the "patient is to be discharged from duty with the police force and I will see him in one month."

On November 20, 2006, he applied for ADR and was interviewed and examined by the medical board on January 10, 2007. On March 21, 2007, the medical board recommended ODR, but rejected ADR for him because "the detective's foot drop began after lifting his eight month old child and there was a hiatus from the time of the line of duty injury in 2003 and the actual

onset of the leg problem” (Exhibit K attached to Notice of Petition). Additionally, the medical board noted that, during his surgery in January 2006, “the surgeon extracted a fresh piece of disc with no evidence of scarring or calcification.” *Id.* The pathologist’s report of the disc fragment submitted after the surgery (Exhibit F attached to Notice of Petition) noted “mild degenerative changes” only. On October 24, 2007, the medical board reviewed petitioner’s case in light of “new evidence,” a letter from Dr. Burstein, dated July 11, 2007, dismissing any connection between the lifting of his son in April 2005 and his disability (Exhibit L attached to Notice of Petition). However, the medical board unanimously reaffirmed its March 21, 2007 decision (Exhibit N attached to Notice of Petition).

On April 2, 2008, petitioner visited Dr. Burstein again “with the same complaint of some back discomfort” (Exhibit O attached to Notice of Petition). Dr. Burstein commented that petitioner “may be a candidate for surgical fusion in the future.” This report was forwarded to the medical board as new evidence and, on June 25, 2008, it deferred a decision “pending further medical documentation” (Exhibit P attached to Notice of Petition). Dr. Borkow re-evaluated petitioner on July 9, 2008, examined his dropped foot and opined that the “neurological impairment of the right leg was present prior to the birth of his son” (Exhibit Q attached to Notice of Petition). Petitioner’s chiropractor wrote a report on July 21, 2008 confirming his treatment by her on July 29, 2003, August 1, 2003, August 8, 2003 and February 1, 2004. After reviewing the new evidence of Dr. Burstein’s last three reports, Dr. Borkow’s July 9, 2008 report, the chiropractor’s report, and an MRI taken on March 21, 2008, the medical board, on September 10, 2008, reaffirmed its determination to approve petitioner’s ODR and disapprove his application for ADR (Exhibit S attached to Notice of Petition).

On remand from the executive director of the pension fund, the medical board reviewed

[\* 6]

“all of the detective’s medical documentation and his previous evaluations by the Medical Board” and it reaffirmed its previous decision on March 25, 2009 (Exhibit U attached to Notice of Petition). The Board of Trustees voted six-to-six on July 8, 2009 to deny petitioner an upgrade from the medical board’s recommendation of an ODR to ADR. This left him with his service pension, which is reputedly more generous than an ODR allowance to him.

Petitioner argues that the medical board omitted mention of certain medical reports where Drs. Burstein and Borkow opined that the cause of his foot drop was the line of duty injury, not the lifting of his newborn son. Additionally, the medical board did not explain why it differed with the reports submitted by these physicians, as it is obliged to do by its rules. Finally, the chairman and a member of petitioner’s medical board sit on another medical board with Dr. Borkow and this might have created a conflict. In all, he claims to have been denied “a fair and non-arbitrary evaluation of his ADR application” (Petitioner’s Memorandum of Law, at p. 20).

The implication of petitioner’s medical history, taken by Dr. Burstein on January 11, 2006 (Exhibit E attached to Notice of Petition) might be that his current back pain is unrelated to the pain he felt lifting his newborn son in April 2005:

“This 39 year old right handed male has had some back pain starting in about April of ‘03 and then in April ‘05, his son was born and he lifted him a great deal and had more pain. But the main thing is that on 12/26, he woke up and felt pain in the back with radiation into his right leg and his right foot became [*sic*] to tingle and he noticed weakness of his right foot and it went completely numb.”

Dr. Burstein’s letter, dated July 11, 2007, dismisses any connection between the events of April 2005 and petitioner’s disability (Exhibit L attached to Notice of Petition). However, there is evidence that petitioner did not merely awaken on December 26, 2005 in pain rooted only in a past LOD injury. On December 28, 2005, he visited Joseph Vitoulis, D.O., “complaining of low back pain after lifting 8-month-old child 2-days ago. The patient states low back pain is

constant, moderate, dull, achy and radiating right leg with numbness and tingling.” Exhibit 13 attached to Verified Answer. None of those who treated petitioner subsequently make any mention of this visit or the explanation petitioner offered for it at the time. Petitioner only references the resulting report in order to clarify Dr. Vitoulis’ credentials and to point out that the report does not note a dropped foot. Six days later, which included the New Year’s holiday weekend, petitioner saw Dr. Borkow with the same symptoms he described to Dr. Vitoulis and had an MRI the day after. He visited Dr. Burstein for the first time on January 11, 2006 and had surgery one week later.

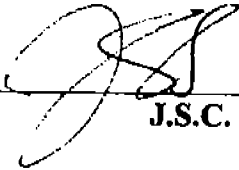
Petitioner omits the visit to Dr. Vitoulis from his otherwise extremely detailed account of relevant events and leaves the impression that, while he experienced some discomfort in April 2005, the LOD injury of March 2003 ultimately forced him into retirement. The medical board saw the events of December 26, 2005, described by petitioner on December 28, 2005, as the critical causal factor for petitioner’s eventual disability. The medical board also believed that the more than two-and-a-half year interval between the LOD injury in March 2003 and the flare-up of pain in December 2005, and the absence of any documented medical attention to his condition from his last chiropractic visit on February 1, 2004 until seeing Dr. Vitoulis on December 28, 2005 demonstrated the near-term origins of petitioner’s physical problems, not a natural and proximate result of his accidental injury in March 2003. The medical board’s finding has a rational basis with credible evidence to support it; the challenged determination is not arbitrary or capricious. The petition cannot be granted.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed with costs and disbursements to respondents.

DATED: April 20, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.

JANE S. SOLOMON

**UNFILED JUDGMENT**  
This judgment has not been filed by the Court Clerk and notice of entry cannot be given hereon. To obtain entry, counsel or party must appear in person at the Judgment Clerk's Office (Room 1418).