

Matter of Francese v Kelly

2010 NY Slip Op 31147(U)

May 10, 2010

Supreme Court, New York County

Docket Number: 108211/2009

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Index Number : 108211/2009
FRANCESE, NEAL
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 108211/2009
MOTION DATE 3/31/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED
3, 4

Notice of Motion/ Order to Show Cause — *ATTIUVIUS* — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**PETITION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

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: May 10, 2010 4:23 PM Paul G. Feinman
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: CIVIL TERM: PART 12

----- X
In the Matter of the Application of
NEAL FRANCESE,
Petitioner,

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

Index No.: 108211/2009

-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.

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).

-----X

Appearances:
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Respondents:
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Papers Considered on Review of this Petition:	
PAPERS	NUMBERED
Notice of Petition, Petition, Exhibits, Affs., Memorandum of Law	1, 2
Verified Answer, Exhibits, Affs., Memorandum of Law	3, 4

PAUL G. FEINMAN, J.:

In this Article 78 proceeding, petitioner Neal Francese 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 him line-of-duty accident disability retirement (ADR) benefits pursuant to the Administrative Code of the City of New York (Administrative Code) § 13-252 and General Municipal Law § 207-k (The Heart Bill), and ordering respondents to retire petitioner with ADR benefits. 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 ADR in accordance with the Heart Bill.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner was appointed to the uniformed force of the New York City Police Department (NYPD) on July 15, 1986 and became a member of the Police Pension Fund (PPF) shortly thereafter. According to petitioner, during the last three years of petitioner's NYPD career, petitioner was the lead detective on several of the NYPD's "largest and highest profile matters." Petition, ¶ 4.

According to petitioner, in 2006, he began to experience chest pain, shortness of breath and lightheadedness, which was attributed to cardiomyopathy. Petitioner's medical history consists of at least a 10-year history of high blood pressure. Petitioner also suffered from leukemia in 1999, but, after receiving several months of chemotherapy treatment, has been in remission. On July 5, 2006, petitioner filed an application for ADR, contending that he is eligible under the Heart Bill. The Heart Bill offers members of the NYPD and the FDNY the presumption that disabling or fatal heart conditions which developed during their career are the

result of the stress of their particular employment.

On July 31, 2006, petitioner was diagnosed by NYPD doctors as suffering from “cardiomyopathy; hypertension,” and was removed from full duty. Petitioner’s Exhibit I.

Medical Board’s First Review:

The Medical Board of the Police Pension Fund (Medical Board) considered petitioner’s application for ADR pursuant to the Heart Bill on October 13, 2006. Respondents’ Exhibit 5. The Medical Board reviewed petitioner’s file, which consisted of petitioner’s medical record, and also interviewed petitioner.

The Medical Board noted that, in 1999, around the same time that petitioner was diagnosed with leukemia, petitioner suffered from a large pericardial effusion. Records from that time indicate that petitioner had been treated for hypertension for six years with medication. He also underwent a test which showed “mildly reduced LVF (left ventricular function).” *Id.*, ¶ 3.

Various testing performed from 1998 until 1999 indicated that petitioner was negative for ischemia and that there was no evidence of left ventricular hypertrophy. One of the tests also revealed a moderate-size pericardial effusion.

In 2003, in pertinent part, the petitioner’s tests indicated that he was negative for ischemia. His left ventricle appeared normal in size with an ejection fraction of 64%. His blood pressure readings were normal.

On June 21, 2006, testing indicated that petitioner’s left ventricle was normal in size, however, his ejection fraction was 30%. The testing reported that “[s]evere hypertension is noted.” Petitioner’s Exhibit F.

The Medical Board examined petitioner, noting that he currently takes five medications,

including Coreg, to regulate his blood pressure, and that he has a family history of high blood pressure. It concluded as follows:

In summary, the detective has a distant history of myelogenous leukemia, which apparently remains in remission. Seven years ago, he had a large pericardial effusion, the cause of which is not clear. It may have been related to the leukemia or other etiology. He has long-standing hypertension which had been well controlled until the last several months, without evidence of significant left ventricular hypertrophy on echocardiography. He has no obstructive coronary disease and globally reduced left ventricular contractility, the cause of which is unknown. This condition is called cardiomyopathy.

Based on the review of the history ... there are significant objective findings precluding the detective from performing the full duties of a New York City Police Officer.

Id., ¶¶ 25, 26.

The Medical Board diagnosed petitioner as having “Cardiomyopathy of Undetermined Etiology,” and disapproved his application for ADR. Although petitioner was approved for Ordinary Disability Retirement (ODR), since he worked 20 years for the NYPD, his “service” pension was greater than ODR, and he retired on that.

Medical Board’s Second Review:

After receipt of “new evidence,” the Board of Trustees remanded petitioner’s application to the Medical Board for further review. Respondents’ Exhibit 4, ¶ 1. The Medical Board reviewed a letter written by Donald S. Miller, M.D., who is petitioner’s cardiologist. Dr. Miller confirmed that petitioner demonstrated an ejection fraction of 64% in 2003, and one of approximately 30% in 2006. He concluded that “[a]s a result, it is inconceivable that his cardiac condition existed prior to August 2003, since at that time his ejection fraction was normal”

Petitioner's Exhibit K. Dr. Miller also wrote that "[i]t is not only unlikely, but virtually impossible that his apparent episode of pericarditis was the primary cause of his present cardiomyopathy, since a noninvasive evaluation in August of 2003, demonstrated normal LV function." *Id.*

The Medical Board concluded that it agreed with Dr. Miller's assessment of petitioner's cardiomyopathy as being of undetermined etiology. It categorized the cardiomyopathy as "not due to the myocardial ischemia and may or may not be related to a previous episode of pericarditis." After examining the petitioner, on March 2, 2007, the Medical Board then reaffirmed its previous decision to deny petitioner's application for ADR.

Medical Board's Third Review:

After receipt of "new evidence and as per verbatim minutes," the Board of Trustees remanded petitioner's application to the Medical Board for further review. Respondents' Exhibit 6, ¶ 1. The minutes, as per the Medical Board's interpretation, "essentially indicate that the Medical Board characterized Dr. Miller's report incorrectly with respect to the detective's cardiomyopathy." The Medical Board reviewed another letter dated June 12, 2007, from Dr. Miller, which stated that "the most likely etiology, in his opinion, of the detective's cardiac pathology was hypertensive cardiomyopathy." *Id.*, ¶ 6.

The Medical Board examined the petitioner. It then noted that all of petitioner's blood pressure readings were normal with the exception of the blood pressures taken in conjunction with a 2006 stress test. Due to this fact, the Medical Board concluded that "it is the impression of the Medical Board that hypertension does not play a significant role in the detective's cardiomyopathy." *Id.*, ¶ 9.

On November 2, 2007, the Medical Board once again denied petitioner's application for ADR.

Medical Board's Fourth Review:

After receipt of "new evidence and as per verbatim minutes," the Board of Trustees remanded petitioner's application to the Medical Board for further review. Respondents' Exhibit 8, ¶ 1.

The Medical Board noted that this remand appeared solely to assess the presence of hypertension and its role in the causation of cardiac disease. The remand had stated that "there was no such thing as just a little hypertension." The Medical Board stated that the "presumption of heart disease would only be overcome in the absence of coronary disease or established hypertension." *Id.*, ¶ 4.

The Medical Board reviewed petitioner's record again in detail. It again stated Dr. Miller's opinion that petitioner's cardiomyopathy was hypertensive. It noted that petitioner has been treated for hypertension for at least 12 years. Petitioner explained to the Medical Board that, only since he started seeing a cardiologist, in 2006, has his hypertension been effectively treated. The Medical Board noted that petitioner seemed to have severely reduced left ventricular function, although he has no significant left ventricular hypertrophy. It also stated that, although petitioner has hypertension, it is apparently controlled. It described petitioner as not suffering from significant obstructive coronary disease.

Upon examination, petitioner stated that he experiences occasional fluttering at times and also shortness of breath after climbing one flight of stairs or while walking uphill. He stated that, in 2006, he was experiencing increased shortness of breath and chest pain. Upon seeing a

cardiologist, he was told that he had cardiomyopathy associated with a low ejection fraction. The Board noted that he has no family history of hypertension. In light of the previously mentioned facts, the Medical Board concluded that the etiology of petitioner's cardiomyopathy is not related to hypertension or coronary disease. It diagnosed petitioner as suffering from "Dilated Cardiomyopathy."

On July 18, 2008, the Medical Board once again denied petitioner's application for ADR. Thereafter, on July 8, 2009, the Board of Trustees adopted the Medical Board's recommendation and disapproved petitioner's application for ADR. Minutes of the Board of Trustees Meeting, Respondents' Exhibit 10. Although the Board of Trustees voted 6-6 to upgrade petitioner to ADR, in the case of a tie, ODR is ultimately awarded. *See Matter of Albano v Board of Trustees of N.Y. City Fire Dept., Art. II Pension Fund*, 98 NY2d 548, 552 (2002).

Petitioner then 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 benefits 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.

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' [internal citations omitted]." *Id.* at 760. 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 [internal citations omitted]." *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147 (1997). When conflicting medical opinions are presented, the Medical Board's takes precedence. *Matter of Borenstein*, 88 NY2d at 760.

The Heart Bill creates a presumption that an officer's heart disease resulting in disability shall be presumptive evidence that it was incurred in the performance of duty, unless rebutted with competent evidence. The Heart Bill acknowledges "not only that heart conditions are an occupational hazard for police officers and firemen, but also that this is a unique condition which generally is not the result of any particular incident but involves a gradual and progressive degeneration as a result of the continuous stress and strain of the job." *Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO v Beekman*, 52 NY2d 463, 471 (1981). When an applicant applies for ADR, in general, he has the burden of proving to the Medical Board that he incurred a disability, and that this disability was incurred during his employment. *Matter of*

Evans v City of New York, 145 AD2d 361, 361 (1st Dept 1988). However, under the Heart Bill, the burden of lack of causation is on the respondents. The statute provides, in pertinent part:

a. [A]ny condition of impairment of health caused by diseases of the heart, or by a stroke, resulting in total or partial disability or death to a paid member of the uniformed force of a paid police department or fire department, where such paid policemen or firemen are drawn from competitive civil service lists, who successfully passed a physical examination on entry into the service of such respective department, which examination failed to reveal any evidence of such condition, shall be presumptive evidence that it was incurred in the performance and discharge of duty, unless the contrary be proved by competent evidence.

General Municipal Law § 207-k.

In general, the Medical Board has been able to successfully rebut the Heart Bill presumption when the medical reports established that the heart condition was due to congenital defects, childhood disease, or caused by conditions that are not related to work stress. *See Matter of Simmons v Herkommer*, 98 AD2d 651, 652 (1st Dept 1983), *aff'd* 62 NY2d 711 (1984); *Matter of Quilty v Ward*, 193 AD2d 439, 440 (1st Dept 1993). It has also been able to rebut the Heart Bill presumption in cases where, although petitioner suffered from certain heart diseases of unknown origin, absent a finding of coronary heart disease and/or hypertension, they could not be considered as work-related conditions. *See Matter of Walsh v Board of Trustees of N.Y. City Police Dept. Pension Fund, Art. II*, 37 AD3d 370, 370 (1st Dept 2007). Neither the Medical Board nor the Board of Trustees is required to establish the cause of the heart condition, only that it was not caused by his duties as a police officer. *Matter of Stegmuller v Brown*, 216 AD2d 23, 23 (1st Dept 1995).

In comparison, the Medical Board's denial of ADR based on the Heart Bill is considered

conclusory when it is not disproved that a petitioner's atrial fibrillation and hypertension were incurred in the performance of his duties as a police officer. *Matter of Lunt v Kelly*, 227 AD2d 200, 200 (1st Dept 1996). Similar to the present case, the court finds that the Medical Board is not able to satisfactorily disprove that petitioner's long history of hypertension did not cause his cardiomyopathy. The Medical Board concluded that hypertension was not the cause of petitioner's cardiomyopathy since his hypertension was controlled with medication. Even the remand from the Board of Trustees had stated that there is no such thing as a little hypertension. Even on remand by the Board of Trustees, the Medical Board does not seem to resolve the conflict with its opinion and that of petitioner's cardiologist, who believes that petitioner's cardiomyopathy is hypertensive. It also appears that the Medical Board does not discuss petitioner's work environment, and this relationship to his heart disease. This relationship alone could support a conclusion that petitioner's heart disease was acquired due to petitioner's stressful job.

Contrary to respondents' arguments, although petitioner's heart condition was classified as of "unknown origin," his case is different from cases where a similar diagnosis was made, in that he did suffer from hypertension. Compare *Matter of Knorr v Kelly*, 35 AD3d 326, 327 (1st Dept 2006), (holding that the Heart Bill presumption was rebutted since petitioner's hypertension was of recent origin) and *Matter of McNamara v Kelly*, 32 AD3d 747, 747 (1st Dept 2006) (holding that petitioner's ADR was denied since his hypertension was recently diagnosed and well-controlled). According to petitioner, he advised respondents that, despite taking multiple high-dose medications for his hypertension, he still experienced uncontrolled episodes of hypertension. Respondents do not dispute that petitioner has been suffering from hypertension

for at least 10 years and also suffers from non-obstructive coronary disease namely, a severely reduced left ventricular function, as of 2006. It was the NYPD itself which removed petitioner from full duty based on his cardiomyopathy and his hypertension.

Although no definition has been standardized for what constitutes competent evidence, the Appellate Division, First Department, has held that a conclusory finding by the Medical Board lacking a factual basis cannot be considered competent evidence to rebut the causation presumption. *Matter of Liston v City of New York*, 161 AD2d 491, 492 (1st Dept 1990). Similar to the present case, even though respondents do not have the burden to establish the causation of petitioner's cardiomyopathy, simply stating that his hypertension is controlled so it evidently cannot be the cause of his hypertension, is not an adequate rebuttal. Although the conclusion of the Medical Board is considered to be an expert opinion, "mere conjecture or unsupported suspicion" does not demonstrate credible evidence, and cannot overcome the statutory presumption of the Heart Bill. *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. I-B Pension Fund*, 90 NY2d at 139, 147. The statement made by the Medical Board is not credible evidence in the form of any medical reports or medical literature which would substantiate the Medical Board's opinions. It did not sufficiently provide an explanation for how, even if controlled through medication, the petitioner's long-standing history of hypertension could not be responsible for his cardiomyopathy.

The Court of Appeals has held that "[t]he practical application of the statute by the boards show that they understood it to have the effect of dispensing with the need for heart disability applicants to point to particular accidents as the cause of the condition." *Uniformed Firefighters Association Local 94, IAFF, AFL-CIO v Beekman, v Beekman*, 52 NY2d at 471-472. In the

present case, petitioner had been suffering from hypertension since at least 1995. In 2003, petitioner's ejection fraction was a normal rate and he was categorized as having normal left ventricular function. However, in 2006, petitioner's ejection rate was 30%, and he was diagnosed with severely reduced left ventricular function. Petitioner is entitled to review under an appropriate application of the statute.

Furthermore, in making its determination, the Medical Board may not "cherry pick portions of letters and reports it received [or] disregard information, without inclusion or comment, that do[es] not support its position." *Weller v Kelly* (Sup Ct, NY County, Feb. 23, 2007, Schlesinger, J., slip op at 11, Index No. 109357/2006); *see also Matter of McCarthy v Board of Trustees of N.Y. City Police Pension Fund, Art. II*, 306 AD2d 156, 157 (1st Dept 2003) (matter remanded when Board of Trustees ignored petitioner's undisputed evidence of a disability). Petitioner's cardiologist has stated that his cardiomyopathy is due to hypertension. Petitioner was retired from full duty because the NYPD labeled him as having cardiomyopathy; hypertension. Additionally, the reports of the Medical Board conflict with one another. For instance, in one of its determinations, it stated that the petitioner has a family history of high blood pressure, but yet, in another one, it stated that petitioner has no family history of hypertension. Yet again, one Medical Board determination stated that petitioner's long-standing hypertension had been well controlled until the last several months. Then a subsequent report by the Medical Board stated that his hypertension apparently is controlled.

In conclusion, respondents, while ignoring the opinion of petitioner's cardiologist, have not disproven the connection between petitioner's long-standing history of hypertension and his heart disease. Accordingly, as they have failed to rebut the Heart Bill presumption, the

determination to deny petitioner ADR benefits based on the Heart Bill is annulled. This matter must be remanded to the Medical Board for a new evaluation of petitioner's application for ADR.

CPLR 2307 (a)

Petitioner also seeks an order, pursuant to CPLR 2307 (a), directing respondents to serve and file all materials in connection with the petitioner's retirement. Petitioner does not address this request in his petition, nor does he support it in his memorandum of law. As such, it appears that the petitioner has abandoned this claim, and the court thereby denies it.


CONCLUSION

In view of the above, it is

ORDERED and ADJUDGED that the petition is granted to the extent of annulling the findings of the Medical Board and the Board of Trustees with respect to the disapproval of the petitioner's application for ADR; and it is further

ORDERED and ADJUDGED that the petition is granted to the extent of directing that the Medical Board conduct a further evaluation of petitioner's application for ADR and issue a determination disproving that petitioner's long-standing hypertension did not cause his heart condition and/or that his heart condition is not related to the consequences of his employment as a police officer, and upon issuance of its determination, the Medical Board shall present such determination to the Board of Trustees, and the petition is otherwise denied.

Dated: May 10, 2010

ENTER:

J.S.C.

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).