

Matter of Lavo v Kelly
2010 NY Slip Op 31526(U)
June 10, 2010
Supreme Court, New York County
Docket Number: 114527/2009
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 61

In the Matter of the Application of
VINCENT LAVIO,

INDEX NO. 114527/09

Petitioner,
-against-

MOTION DATE March 10, 2010

RAYMOND KELLY, *et al.*,

MOTION SEQ. NO. 001

Respondents.

MOTION CAL. NO. 62

The following papers, numbered 1 to 8 were read on this petition pursuant to CPLR Article 78

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

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

4-6

Replying Affidavits _____

7

Sur-Reply Affidavit _____

8

Cross-Motion: Yes No

Upon the foregoing papers, the petition pursuant to CPLR article 78 is decided in accordance with accompanying 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: 6/10/10

O. Peter Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
In the Matter of the Application of VINCENT LAVIO,

Petitioner,

DECISION, ORDER
AND JUDGMENT

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

Index No.: 114527/2009

-against-

RAYMOND KELLY, as the Police Commissioner of the
of the City of New York, and as Chairman of the Board
of Trustees of the Police Pension Fund, Article II,
BOARD OF TRUSTEES of the Police Pension Fund, of
Article II, NEW YORK CITY POLICE DEPARTMENT
and THE CITY OF NEW YORK,

Respondents.

-----X
O. PETER SHERWOOD, J.:

In this CPLR Article 78 proceeding in the nature of mandamus, the petitioner, Vincent Lavio ("petitioner"), a retired police officer, seeks an order and judgment directing 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, the Board of Trustees of the Police Pension Fund, Article II ("the Board of Trustees"), the New York City Police Department ("NYPD"), and the City of New York (collectively "Respondents") to process and consider petitioner's application for accidental disability retirement ("ADR") benefits pursuant to General Municipal Law § 207-k, known as the "Heart Bill".

Respondents cross move for an order and judgment pursuant to CPLR §§ 7804 (f) and 3211 (a) (7) dismissing the petition for failure to state a claim.

The dispositive issue in this proceeding is the timeliness of petitioner's application for ADR benefits. For the reasons that follow, the petition is

Background

Petitioner was appointed to the NYPD on January 20, 1987, and, pursuant to New York City Administrative Code ("Administrative Code") § 13-214, became a member of the New York City

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Police Pension Fund (Ver. Pet. ¶ 4; Affirmation of Ilyse Sisolak in Support of the Cross Motion [Sisolak Affirm], ¶ 3). Petitioner remained a member of the NYPD from the date of his appointment until his retirement for service on June 30, 2008, at 50 years of age (Ver. Pet. ¶ 4). Prior to his appointment, petitioner passed all requisite physical and mental examinations (*id.*).

On or about June 23, 2006, petitioner applied to the Pension Fund for a line-of-duty disability pension, known as Accident Disability Retirement (“ADR”), claiming in his application that a left shoulder derangement, sustained on August 30, 2005, when he was supporting the removal of emergency fire suppression cylinders which slipped off a Bobcat forklift, prevented him from performing the duties of a police officer (Sisolak Affirm., Ex. “2”). On July 6, 2006, the Police Commissioner, filed an application requesting that the Medical Board of the Pension Fund (“Medical Board”) examine petitioner to determine if he was eligible for Ordinary Disability Retirement (“ODR”) as a result of left shoulder derangement (Sisolak Affirm. ¶ 5, Ex. “3”).

On July 21, 2006 and February 2, 2007, the Medical Board conducted interviews and physical examinations of petitioner and evaluated his medical records (*id.* ¶ 6, Ex. “4”). The Medical Board recommended disapproval of both petitioner’s application for ADR and the Police Commissioner’s application for ODR finding that petitioner’s “complaints of severe pain in the left shoulder are not substantiated by the objective evidence” (July 21, 2006 Medical Board Report, ¶ 20). On February 2, 2007, the Medical Board considered petitioner’s ADR application and the Police Commissioner’s ODR application for the second time based upon new medical evidence, namely an MR arthrogram of the left shoulder performed November 8, 2006, showing a partial tear and degenerative changes of the left shoulder, and a letter of an orthopedic surgeon, dated January 26, 2007, stating that petitioner’s shoulder had not improved and diagnosing post traumatic stiffness February 2, 2007 Medical Board Report ¶¶ 4-5). After reviewing the medical information and conducting a physical examination, the Medical Board found a “paucity of any objective physical findings that would preclude petitioner from performing the full duties of a [police officer]” and again recommended that the Board of Trustees deny both the ADR and ODR applications (*see* Petition ¶ 13, Ex. “H”).

After tabling petitioner’s application on May 7, 2007, the Board of Trustees, at its June 13, 2007 meeting, adopted the final recommendation of the Medical Board, and denied both petitioner’s

ADR and ODR applications (Sisolak Affirm. ¶ 9, Ex. "5"). By letter dated June 25, 2007, petitioner was advised of the Board of Trustees' decision and further advised that if he had new medical evidence to support his claim for disability retirement he could file a new disability retirement claim or file an Article 78 proceeding to contest the Board's denial. It does not appear that petitioner either contested the Board of Trustees' decision by filing an Article 78 proceeding or filed a new disability retirement claim.

On May 19, 2008, petitioner filed an application for a service retirement (Sisolak Affirm. ¶ 12, Ex. "7") and he subsequently retired on June 30, 2008. Prior to his retirement, petitioner underwent a Nuclear Stress Test at the Staten Island Heart Imaging P.C. on May 8, 2008 and was advised that the results were normal (Ver. Pet. ¶ 6). On June 10, 2009, petitioner consulted with Dr. Robert A. Vaccarino, a cardiologist, because of continuing chest pain and shortness of breath. Dr. Vaccarino conducted a Nuclear Stress Test that same day which showed "a large to moderate sized area of peri-infarct ischemia in the left descending distribution." (Ver. Pet. ¶ 7). Dr. Vaccarino also reviewed the May 8, 2008 test results of petitioner's first Nuclear Stress Test and found "evidence of reversible septal/apical defect consistent with ischemia in the territory of the mid-LAD" (Ver. Pet. ¶ 10, Ex. "D"). On June 12, 2009, petitioner underwent a Cardiac Catheterization at Staten Island University Hospital which demonstrated a diffuse 100% stenosis in the mid-LAD territory and a 50% stenosis of the left circumflex artery (Ver. Pet. ¶ 8, Ex. "B").

Thereafter, on or about August 31, 2009, petitioner attempted to file a post-separation ADR application under the provisions of the Heart Bill (General Municipal Law § 207-k) alleging that as a result of his police duties he suffered a debilitating condition of the heart. His attorney contended that had petitioner known the May 8, 2008 Nuclear Stress Test was positive, he would have immediately filed an application for disability retirement benefits and that petitioner should not be penalized because he was misinformed as to the results (Ver. Pet. ¶ 12, Ex. "E"). The NYPD Medical Division declined to accept petitioner's application for ADR benefits under the provisions of the Heart Bill because it was filed thirteen months after petitioner separated from service on a service retirement and the statute requires that the applicant for ADR be a paid member of the police force. By letter dated October 22, 2009, the Assistant Commission of NYPD's Legal Department

sustained the decision of NYPD's Medical Division, declining to accept petitioner's ADR application (Sisolak Affirm ¶ 15, Ex. "8").

Petitioner now seeks an order and judgment pursuant to CPLR Article 78 in the nature of mandamus to compel respondents to accept and process his ADR application claiming that respondents' denial of his application is arbitrary and unjust. Respondents contend that mandamus to compel is an improper vehicle for obtaining the relief sought as it is within the Board of Trustees' discretion to determine whether or not to permit a post-retirement ADR application. In addition, respondents contend that petitioner has failed to demonstrate that he has a clear legal right to the relief requested. Since petitioner was not a paid member of the police force when he applied for ADR, a strict interpretation of the relevant provision of the Heart Bill makes clear that petitioner is not entitled to the presumption that his heart disability was incurred in the performance and discharge of his duty. Thus, petitioner's application was properly rejected.

Discussion

The standards governing the availability of article 78 relief in the nature of mandamus are well settled. Such relief is available only where the petitioner's right to performance is so clear as to admit of no doubt or controversy (*see, Matter of Coastal Oil of N.Y. v Newton*, 231 AD2d 55 [1st Dept 1997], *appeal dismissed* 91 NY2d 848 [1997], *lv denied* 91 NY2d 808 [1998]), and then only to compel the performance of a statutory duty that is ministerial in nature and does not require the exercise of judgment or discretion (*see, Matter of Crain Communications, Inc. v Hughs*, 74 NY2d 626, 628 [1989]).

The Heart Bill, upon which petitioner relies in seeking ADR benefits, creates a presumption that a disabling heart condition suffered by a police officer or firefighter, who passed a physical examination upon entry into service, was sustained as a result of his or her employment if not rebutted by contrary competent proof (*see, General Municipal Law § 207-k; Uniformed Firefighters Assn. Local 94 v Beekman*, 52 NY2d 463, 472-473 [1981]). However, this statutory provision by its express language is limited to "a paid member of the uniformed force of a paid police department".

Petitioner argues that respondents' refusal to exercise its discretion to consider his post-retirement ADR application when there is evidence of a misdiagnosis of his heart condition prior to

his separation from service is contrary to the intent and purpose of the Heart Bill. Although the heart condition was not diagnosed prior to his retirement, petitioner contends there is sufficient evidence that his disabling heart condition developed while he was still a paid member of the police department and that equitable considerations should compel respondents to consider his ADR application.

Petitioner's arguments principally rely upon the decisions of the Appellate Division, First Department in *Mulheren v Board of Trustees of Police Pension Fund, Article II* (307 AD2d 129 [2003]) and of Justice Marilyn Shafer of this court in the case of *Myvett v Kelly* (Index No. 111502/05 [June 13, 2006] [Pet's Memorandum of Law, Appendix "A"]). The First Department in *Mulheren* observed that the Board of Trustees has the discretion to expand a pending ADR application to include heart disease where the disabling heart condition occurred at the time of retirement and where "substantial equitable considerations warrant such action" (*id.* at 132). The court further found that "Board of Trustees, having itself created the discretionary rule, is obligated to exercise it in a non-arbitrary, non-capricious manner" (*id.* at 134). On that basis, the First Department found the Board of Trustees' refusal to remand the petitioner's ADR application to the Medical Board for consideration to be an abuse of discretion and found that equitable considerations warranted the remand to the Medical Board, specifically that: (1) the petitioner's application was pending before the Medical Board when he sought to amend his application; (2) there was evidence that the heart-related disability may have been incurred while petitioner was still a paid member of the NYPD; and (3) the condition was not detected until after the petitioner retired because of potentially faulty diagnoses upon which petitioner relied.

Justice Shafer, citing the decision in *Mulheren*, held that the time of diagnosis of the heart-related disability was not dispositive under the Heart Bill provided the disabling heart condition was incurred while the applicant was a paid member of the police force. Justice Shafer further held that on the particular facts in *Myvett* the Board of Trustees' failure to accept the petitioner's ADR application was an abuse of discretion because the petitioner's heart condition could only have been incurred while the petitioner was a paid member of the police force and, on that basis, she remanded the matter for consideration in accordance with the terms of the Heart Bill. The determinative facts supporting this decision are that: (1) the petitioner's HIP provider failed to furnish petitioner's

physician with test results confirming a serious heart condition for 3 ½ weeks and petitioner himself did not learn of the diagnosis until 13 days after the date of his retirement; and (2) petitioner's ADR application was submitted only 22 days after his retirement.

Here, the evidence petitioner submits to support his claim that he suffered from a pre-retirement disabling heart condition is the August 3, 2009 letter of Dr. Vaccarino, with whom petitioner consulted on or about June 10, 2009, due to "tight retro-sternal chest pain (non radiating) with shortness of breath within the past 12 months". Dr. Vaccarino also expressed his opinion that the results of petitioner's Nuclear Stress Test performed by Staten Island Heart Imaging were reported incorrectly as being normal, while he found evidence of heart disease.

Neither *Mulheren* nor *Myvett* provides adequate support for petitioner. Petitioner was not "a paid member of the uniformed force of a paid police department" at the time he submitted the ADR application relating to the alleged heart condition. He did not have a pending ADR application which he sought to amend after separation from the uniformed force. Further, although he now alleges that Staten Island Imaging failed to accurately report the findings of the first Nuclear Stress Test, petitioner did not mention any complaints of chest pain or shortness of breath on his prior ADR application and did not submit to the first Nuclear Stress Test because he was experiencing symptoms typical of heart-related disease. A rule that would require acceptance of a post-retirement ADR application to consider a possible pre-retirement heart condition based on a claim that the condition could have been diagnosed while petitioner was still employed, would read the current employment limitation out of the Heart Bill. Mandamus relief is not available on the facts presented here.

In view of the above, it is hereby

ORDERED that the petition is denied; and it is further

ORDERED and ADJUDGED that the cross motion is granted

This constitutes the decision, order and judgment of the Court.

DATED: ~~July 10, 2010~~ **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).

ENTER,



PETER SHERWOOD

J.S.C.