

Matter of Fulbrook v Kelly

2010 NY Slip Op 32019(U)

July 27, 2010

Supreme Court, New York County

Docket Number: 114243/09

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN, J.S.C.

PART 57

Index Number : 114243/2009
 FULBROOK, KEITH
 vs.
 KELLY, RAYMOND
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. 114243/09
 MOTION DATE _____
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

petition
this motion is for Art. 78

PAPERS NUMBERED	
1	_____
2	_____

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

Memo of Law W1

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ *petition* is *granted*

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.

FILED
 JUL 30 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 7-27-10


 MARCY S. FRIEDMAN, 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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
In the Matter of the Application of

KEITH FULBROOK,

Index No.: 114243/09

Petitioner,

DECISION/ORDER

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.

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_____ x

In this Article 78 proceeding, petitioner, a retired police officer, challenges a decision of respondent The Board of Trustees of the Police Pension Fund, Article II (“Board of Trustees”), denying petitioner’s application for accident disability retirement (“ADR”) benefits and instead awarding ordinary disability retirement (“ODR”) benefits. Petitioner claims that he is entitled to ADR benefits because respondents incorrectly determined that the line of duty event which resulted in his disability was an “incident” and not an “accident.”

The relevant facts are as follows: According to petitioner’s Line-of-Duty Injury Report, on September 7, 2007, while petitioner was fueling an aircraft, he fell off of a helicopter dolly

onto the concrete flight line, approximately two to three feet below. As a result, petitioner injured his wrist, ankle, knee, and shoulder.

After examining petitioner, reviewing his medical records, and evaluating the reports of doctors who examined him, the Medical Board Police Pension Fund, Article II (“Medical Board” or “Board”), by a determination dated September 29, 2008, recommended approval of petitioner’s application for ADR benefits and disapproval of the Police Commissioner’s application for ODR benefits. (Answer, Ex. 5, ¶ 29.) On June 10, 2009, the Board of Trustees disagreed with the Medical Board’s recommendation and denied ADR benefits to petitioner. (Id., Ex. 16.) Petitioner now seeks to have this determination annulled.

A reviewing court may not set aside the determination of the Board of Trustees denying accidental disability retirement, as a result of a tie vote, “unless ‘it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident.’” (Matter of Meyer v Board of Trustees of the New York City Fire Dept., Art. 1-B Pension Fund, 90 NY2d 139, 145 [1997], rearg denied 90 NY2d 936, quoting Matter of Canfora v Board of Trustees of the Police Pension Fund of the Police Dept. of the City of New York, Art. II, 60 NY2d 347, 352 [1983].) An accident is defined as a “sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact.” (Matter of Lichtenstein v. Board of Trustees, 57 NY 2d 1010, 1012 [1982] [internal quotation marks omitted].) For an accident to be found, there must have been a “precipitating accidental event . . . which was not a risk of the work performed.” (Matter of Starnella v. Bratton, 92 NY2d 836, 839 [1998], rearg denied 92 NY2d 921, citing Matter of McCambridge v. McGuire, 62 NY2d 563, 567-568 [1984]. See Hallihan v Ward, 169 AD2d 542 [1st Dept 1991] [“It is the precipitating cause of the injury,

rather than the job assignment at the time, that determines entitlement to accidental disability benefits.”.)

The Court of Appeals has held that “[a] fall down the stairs as a result of one’s own misstep, without more, is not so out-of-the-ordinary or unexpected as to constitute an accidental injury as a matter of law.” (Matter of Starnella, 92 NY2d at 839. See also Morgan v Kerik, 305 AD2d 288, 289 [1st Dept 2003], lv denied 1 NY3d 507 [2004] [“Petitioner’s CPLR article 78 application was properly denied since it cannot be said as a matter of law that his slip and fall was due to wetness on the steps rather than his own misstep.”].) In contrast, the Court of Appeals has held that a police officer’s slip and fall on a puddle of water in a locker room was so sudden and unexpected as to constitute an accidental injury. (Matter of Starnella, 92 NY2d at 839. See also Matter of McCambridge v. McGuire, 62 NY2d 563, supra [accident disability granted where petitioner slipped on wet pavement during a rainstorm while entering his patrol car].)

In the instant case, the Board of Trustees relied on contemporaneous evidence of the event in determining whether petitioner’s injury was accidental. This evidence included the Line-Of-Duty Injury Report, which was signed by petitioner on the date of the accident. In the Report, petitioner gave the following description of the accident: “While I was fueling Aircraft I turned and lost my balance and fell off of the helicopter dolly.” (Answer, Ex. 2.) The description of the event by Sergeant Michael Hendrix, petitioner’s supervisor, in the Aided Report Worksheet was: “While performing official police duties did slip, tripped off helicopter dolly falling onto concrete flightline.” (Id.) Detective Brendan Galligan, in his witness statement dated September 7, 2007, similarly stated that “while performing refueling duties to the aircraft

Keith [Fulbrook] tripped off the dolly to the floor head first.” (Id.) A witness statement from the date of the accident, provided by Detective Thomas Gavigan, explained that petitioner while in the process of refueling Air-Sea 12, “fell off the aircraft dolly and landed on the ground between the dolly and the fuel truck.” (Id.)

Petitioner argues that the Board of Trustees failed to consider other evidence in the record which showed that he sustained an accidental injury. Petitioner cites an affidavit that he provided to the Board of Trustees, sworn to on May 20, 2009, in which his description of the cause of his injury differs from his description in the Line-Of-Duty Injury Report. In this affidavit, petitioner stated that, at the time of his accident, he was carrying a fifty pound hose and as he “stepped from the fuel truck platform to the helicopter platform . . . , Detective [William] Lapaugh simultaneously rammed the tug into the dolly,” causing him to slip and fall. (Petition, Ex. B.) Petitioner also provided the Board of Trustees with affidavits from Detectives Lapaugh and Gavigan, sworn to on April 4, 2009 and May 20, 2009, respectively, which attributed the cause of petitioner’s fall to the shaking of the platform as a result of the tug being rammed into the dolly. (Answer, Exs. 14-15.)

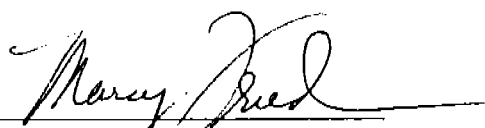
These affidavits that petitioner submitted to the Board of Trustees diverge from the initial reports of the accident, and were submitted more than a year and a half after the accident occurred. The Board of Trustees could reasonably find that the contemporaneous evidence, showing that petitioner lost his balance and fell off of the dolly, was more reliable than the subsequent statements that petitioner’s fall was caused by the unexpected movement of the tug. (See Bisiani v Kelly, 39 AD3d 261 [1st Dept 2007]; Reichfeld v Safir, 259 AD2d 298 [1st Dept 1999], lv denied 93 NY2d 809; Danyi v Board of Trustees of New York City Employees’

Retirement Sys., 176 AD2d 451 [1st Dept 1991].) Given the contemporaneous evidence to the contrary, it cannot be said as a matter of law that plaintiff's injury was caused by a sudden, unexpected occurrence, or that the denial of ADR benefits to petitioner was arbitrary and capricious.

Accordingly, it is hereby ORDERED that the petition is dismissed in its entirety.

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

Dated: New York, New York
July 27, 2010



MARCY FRIEDMAN, J.S.C.

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