

Matter of Ortiz v Kelly
2010 NY Slip Op 32495(U)
September 13, 2010
Sup Ct, NY County
Docket Number: 115486-2009
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____

Justice

PART 10

Index Number : 115486/2009
 ORTIZ, EDWIN
 VS.
 KELLY, RAYMOND
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

del-kian

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION, ORDER +
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: SEP 13 2010

J. Gische
HON. JUDITH J. GISCHE 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: IAS PART 10**

-----X
In the matter of the application of
EDWIN ORTIZ,
Petitioner,

DECISION/ ORDER
Index No.: 115486-2009
Seq. No.: 001

For a judgment pursuant to
ARTICLE 78 of the CPLR

Present:
Hon. Judith J. Gische
J.S.C.

-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

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers

Notice of Pet, Verified Pet, Exhibits,
Respondents' answer w/Exhs.

UNFILED JUDGMENT
This judgment has not been entered by the Court's 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
1415).

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an article 78 petition brought by Edwin Ortiz ("Ortiz") a retired NYPD
uniformed police officer. Ortiz contends that he sustained a line of duty injury and that
his applications for disability retirement should have been granted by the respondents,
but they were denied. Ortiz seeks an order and judgment vacating the denial on the
basis that such determination was arbitrary, capricious and without a rational basis.

Respondents have answered the petition and seek the dismissal of this action because their determination is supported by substantial evidence, rationally based and neither arbitrary nor capricious.

Since an Article 78 proceeding is a special proceeding it may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised (CPLR § 409 [b]; CPLR §§ 7801, 7804 [h]). Thus, much like a motion for summary judgment, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial (CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 [1984]; Battaglia v. Schumer, 60 A.D.2d 759 [4th Dept 1977]).

Underlying Facts

Ortiz became a police officer with the NYPD in July 1988. On July 11, 2006, while on duty inside a building, he was struck and injured when some plaster from a ceiling fell down on him, knocking him to the floor. According to the line of duty injury report filed on the day of the accident, Ortiz stated that the ceiling struck him on the "left side of my body causing pain and injuries..." An x-ray was taken at Bellevue and according to the radiologist's report, the shoulder "alignment is satisfactory. No fracture or dislocation identified." Although a "tiny ossific fragment" was observed, the report indicates that it is "smoothly marginated . . ." and "may represent an unfused apophysis or the sequella of remote trauma."

Following the accident, on July 19, 2006, Ortiz consulted with an orthopedic surgeon ("Dr. Hanypsiak" sometimes "petitioner's orthopedic surgeon"). In his report, Dr. Hanypsiak states that there is no misalignment or deformity, and the range of

motion is apparently normal. Dr. Hanypsiak ordered an MRI. Following the MRI, in his August 2006 report, Dr. Hanypsiak stated that Ortiz reported having significant shoulder pain, especially with increased physical activity. The doctor diagnosed Ortiz with having a left shoulder SLAP tear. Dr. Hanypsiak also observed that there was a "thickening of the anterior band" of one of petitioner's shoulder ligaments and observed that it "may be related to a prior injury." Dr. Hanypsiak prescribed physical therapy for four weeks, indicating that if there was no improvement in Ortiz's condition, then surgery might be indicated.

When Dr. Hanypsiak next saw petitioner, Ortiz reported little improvement and that he was still experiencing pain. He declined further physical therapy, preferring to undergo surgery. Dr. Hanypsiak agreed that surgery was "reasonable" to repair the tear and Ortiz underwent arthroscopic surgery in September 2006. Following the surgery, Dr. Hanypsiak reported that the undersurface of the rotator cuff was intact as was the labrum, with the exception of the posterior labrum. The doctor observed bursitis in Ortiz's shoulder and a complete bursectomy was performed. Although other small tears were observed, they were less than 50% of the thickness of the tendon and they were not repaired. The postoperative diagnosis was "left shoulder small posterior labral tear, partial thickness bursal sided cuff tear, rotator cuff tendinitis."

In a follow up report dated September 2006, Dr. Hanypsiak reported that Ortiz was doing quite well and "the shoulder is just sore . . . mostly at night." In later reports, however, Dr. Hanypsiak states that Ortiz is reporting "substantial pain . . ." and "persistent pain . . ." in the shoulder. Ortiz continued to see Dr. Hanypsiak for follow up visits throughout September, October and November 2006. He was also physically

examined by a police department orthopedic surgeon who authorized physical therapy and recommended modified duty.

Ortiz filed an application for Accident Disability Retirement benefits ("ADR") in December 2006 and on March 5, 2007, the Police Commissioner submitted an application on petitioner's behalf for Ordinary Disability Retirement benefits ("ODR"). After physically examining Ortiz, conducting various strength tests, interviewing him, and reviewing all his submissions, including the numerous reports by Dr. Hanypsiak and another doctor with whom Ortiz treated ("Dr. Rosenberg"), the Medical Board of the Police Pension Fund, Article II ("Medical Board") recommended that both applications be denied. The Medical Board reported its physical examination had revealed no atrophy and petitioner's test results were normal. According to this report (dated May 4, 2007) there was "insufficient objective physical findings which would preclude him from performing the full duties of a New York Police Officer...The mechanism of injury which was a direct impact on top of the shoulder would not be causative for a SLAP tear. Review of the intra operative photographs revealed no evidence of a SLAP lesion. His rotator cuff was also intact. In August 2007, the Police Pension Fund, Article II Board of Trustees ("Board of Trustees") tabled the applications and a month later (September 2007) remanded the applications to the Medical Board for consideration of new evidence.

In November 2007, following the remand, the Medical Board again recommended denial of the disability applications. Although further physical examinations of Ortiz not only showed that the officer was "depressed" about his physical limitations and he, in fact, appeared to be in pain when tested, the Medical

Board opined that there was "insufficient objective physical findings which would preclude him from performing full duty."

Ortiz underwent a second surgery on his left shoulder in March 2008 and the post operative surgery report diagnosis was "substantial adhesions in the subacromial space." On March 21, 2008, the Board of Trustees remanded the disability applications to the Medical Board "in light of the new surgery " and for "new evidence to be submitted."

On August 1, 2008, Ortiz retired while on restricted duty, based on the length of his service as an officer (20 years).

The new evidence provided by Ortiz to the Medical Board consisted of several letters prepared by Dr. Hanypsiak and Dr. Nestor Blyznak, another orthopedic surgeon who had treated Ortiz, as well as letters from his physical therapist. The Medical Board members also re-interviewed and re-examined petitioner. On September 19, 2008, the Medical Board decided to postpone further consideration of the applications until Ortiz had provided his doctors' post-operative notes. In its report, the Medical Board wrote that "On physical examination today, the officer had evidence of atrophy of the supra and subspinatus musculature [and] limited range of motion with regard to flexion, abduction, internal and external rotation. . ." However, petitioner showed "no evidence of marked atrophy, nor was there any evidence of fasciculation [and he] was able to reach to T8 with his right hand and approximately to T12 with his left hand."

Upon receiving and reviewing the post-operative notes, the Medical Board, once again, recommended denial of the applications. In its October 24, 2008 report the members of the Medical Board noted the "marked discrepancy" between what they

observed in examining the petitioner and the range of motion described by Dr. Hanypsiak in his last evaluation. While the Medical Board found that the officer continued to have "subjective complaints of left shoulder pain. These complaints are not substantiated by the extensive evaluation by his neurologist..." or other studies performed by his own doctors. The Medical Board found that although Ortiz had mild residual effects in his shoulder, there were insufficient to preclude him from functioning as a police officer. The Board of Trustees tabled the applications once again in January 2009, Ortiz request a third remand and it was granted on February 27, 2009.

Following the third remand, on March 27, 2009, the Medical Board recommended disapproval of the disability retirement applications. The Medical Board doctors stated that despite Ortiz's complaints of pain and extensive pain management treatment, there were no physical findings consistent with a complex regional pain disorder and although there were some mild deficits, they did not preclude him from performing his full duties. Petitioner's attorney requested a fourth remand and the Board of Trustees denied that request. Ortiz's applications for disability retirement were denied on July 10, 2009. After the third remand, but before being notified that his disability applications were denied, Ortiz applied for reinstatement to the force (i.e. to come out of retirement). That application was denied in May 15, 2009.

Ortiz contends that the Board of Trustees decision to deny his disability applications, is arbitrary, capricious, unreasonable and unlawful because his personal physicians and other medical providers opine that he is disabled. Thus, according to petitioner, the Medical Board's decision, that he is not disabled, is without a rational basis. Petitioner argues that the court should decide that just because the matter was

remanded three times by the Board of Trustees does not mean the Medical Board took a hard look at his case. To the contrary, he believes the Medical Board's reports are pro forma, generalized, and internally inconsistent with one another. Ortiz claims the Medical Board did not thoroughly consider all the medical evidence he presented, but even if it did consider such evidence, the Medical Board's recommendation to the Board of Trustees is illogical. Ortiz points out that the Medical Board observed that petitioner was experiencing "subjective pain," yet it insisted on finding "objective evidence" of such pain. Petitioner claims that although the Board of Trustees has considerable discretion in making decisions, such decisions should be uniform or at least, consistent. He claims the decision to deny him disability retirement benefits is completely arbitrary.

Discussion

The award of accidental disability retirement benefits is a two-step process. The first step involves fact finding by the Medical Board and then, after it has examined the applicant, considered the evidence and otherwise completed its investigation, a decision by the Medical Board whether the applicant is disabled. If the Medical Board concludes the applicant is disabled, then it proceeds to make a recommendation to the Board of Trustees about whether the disability was "a natural and proximate result" of an accidental injury received in the line of duty (Bornstein v. NYCERS, 88 NY2d 756 [1996]). If, however, the Medical Board finds that the petitioner is not disabled, then there is no need for the Medical Board to further decide whether the injury was the proximate cause of an injury received in the line of duty. The burden of proving that petitioner's claimed ailments were and are causally connected to the accident that

occurred in July 2006 rests solely on the petitioner. Thus, petitioner had to convince the Medical Board that he was physically incapable of performing the duties attendant to his job as a uniformed police officer and that his incapacitation was the natural and proximate result of the July 2006 accident (NYCAC § 13-252; Evans v. City of New York, 145 AD2d 361 [1st Dept 1988]; In re Drayson v. Board of Trustees, 37 A.D.2d 378 [1st Dept 1971]). Petitioner's burden with respect to ODR benefits is similar, except once he proved a disability, he did not then have to prove that the injury was sustained while in the line of duty (NYCAC § 13-251).

Petitioner's explanation for why the Medical Board's decision is arbitrary and capricious rests solely on his personal belief that the opinions of his doctors (that he is disabled) are correct and the determination by the Medical Board (that he is not disabled) is incorrect. Whereas Dr. Hanypsiak opined that Ortiz could no longer perform his duties as a police officer because he could not, among other things, protect himself, the Medical Board found that Ortiz showed no evidence of disability or atrophy. The Medical Board noted there were "marked discrepancies" between what Ortiz's own physicians reported (i.e. petitioner's range of motion) and their own testing of him by department doctors. The Medical Board expressed skepticism that Ortiz's condition was proximately caused by the plaster ceiling that fell on him, noting that "[t]he mechanism of the injury which was direct impact on top of the shoulder would not be causative for a SLAP tear" Although the Medical Board observed petitioner flinching during testing and otherwise responding in a manner consistent with subjective pain, they could find no objective proof of the kind of pain and limitations that Ortiz continued to complain of. They noted evidence of tendinitis and bursitis – observed

and recorded by Ortiz's own personal physicians – as well as Ortiz's decision that he preferred surgery to more physical therapy.

Where there is a dispute among medical experts about the nature of an injury and whether it impacts on the applicant's ability to perform his or her duties, that dispute is for the Medical Board to resolve (In re of Muffoletto v. N.Y. City Emples. Ret. Sys., 198 A.D.2d. 7 [1st Dep't 1993]; In re Cassidy v. Ward, 169 A.D.2d 482 [1st Dep't 1991]). Furthermore, 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 (Bornstein v. NYCERS, 88 NY2d at 760 *citing* Matter of Canfora v. Board of Trustees, 60 N.Y.2d 347, 351 [1983]; Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 230-231 [1974]). Thus, Medical Board's disability determination will not be disturbed if the determination is based on "substantial evidence" which has been interpreted as there being some credible evidence" supporting the Medical Board's determination and recommendation (In re Meehan v. Kelly, 50 A.D.3d 523 [1st Dept 2008] internal citations omitted). The Medical Board is not required to accept the opinion of petitioner's examining physician (In re Meehan v. Kelly *supra*.)

Petitioner correctly points out that a three time remand does not necessarily mean the application was properly evaluated. Here, however, each time the case was remanded, petitioner was allowed (and at times encouraged) to amplify the record by submitting additional evidence. Ortiz was also re-tested, re-interviewed and re-examined each time the matter was before the Medical Board and his attorney put in letters presenting various arguments, focusing the Medical Board's attention on the same issues raised here.

The reports prepared by the Medical Board to the Board of Trustees are not, as petitioner suggests, conclusory, blunderbuss or self-serving documents. Rather each report contains a cogent description of the testing done on the plaintiff, the results observed and comparisons to what petitioner's doctors achieved applying the same tests. The Medical Board also discusses in each report the documentary evidence submitted by the petitioner. Given the completeness of these reports, the Board of Trustees' decision to rely on the Medical Board's recommendations to deny disability retirement was neither arbitrary nor capricious, and the Board of Trustees decision was supported by credible evidence (Canonico v. Kelly, 38 A.D.3d 444 [1st Dept. 2007]).

The separate issue of whether petitioner should have been restored to his former position, because he made the request within one year of retirement, raises arguments that have nothing to do with the Medical Board's decision that petitioner is not disabled and therefore, ineligible for disability retirement benefits. Whereas the Medical Board is responsible for deciding whether petitioner is disabled, NYPD's decision not to restore petitioner to his former title is an entirely separate matter. Even if he was not reinstated because of his poor physical condition, that decision is not binding on the Medical Board nor determinative of whether Ortiz is disabled within the meaning of NYAC § 13-252 or eligible for disability benefits.

Petitioner has not shown that the determination by the respondents was arbitrary or capricious. To the contrary, the determination to deny petitioner's disability retirement benefits is rationally based and there is substantial evidence supporting the Medical Board's recommendation to the Board of Trustees which was affirmed after three separate remands. Since there are no triable issues of fact are raised, the

petition is denied and this action dismissed.

Conclusion

In accordance with the foregoing,

It is hereby

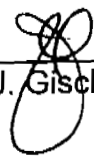
Ordered, Declared and Adjudged that the petition is hereby denied and this action is dismissed; and it is further

Ordered that this constitutes the Decision, Order and Judgment of the Court.

Dated: New York, New York
September 13, 2010

So Ordered:

Hon. Judith J. Gische, JSC



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).