

Matter of Mikes v Kelly

2010 NY Slip Op 32669(U)

September 24, 2010

Sup Ct, NY County

Docket Number: 115491/09

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.
Justice

PART _____

Index Number : 115491/2009
MIKES, STEPHEN
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for Art 78 proceeding

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~~ petition is denied
per decision dated 9-22-10.

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: 9-24-10



MARCY S. FRIEDMAN, J.S.C.^{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

STEPHEN MIKIS,

Index No.: 115491/09

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
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 on this
appear in person at the Judgment Clerk's Office
1405

_____ 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 the Police Commissioner’s application for ordinary disability retirement (“ODR”) benefits. Petitioner claims that he is entitled to ADR benefits as a result of injuries he sustained to his neck, back, and shoulders in the line of duty.

Between 2002 and 2005, the Medical Board Police Pension Fund, Article II (“Medical Board” or “Board”) reviewed petitioner’s and the Police Commissioner’s retirement applications five times. (Petition, Exs. B-F.) On June 8, 2005, the Board of Trustees denied petitioner’s

request to remand his application to the Medical Board, and denied petitioner's application for ADR and approved the Police Commissioner's application for ODR, based on a finding by the Medical Board of somatization disorder. (Answer, Ex. 13.) Petitioner retired on an ODR pension on October 9, 2005. Petitioner then commenced an article 78 proceeding seeking to annul the determination to deny him ADR, which was dismissed without prejudice and marked off calendar, on consent of the parties, in order to remand the case to respondents for further consideration. (Petition, Ex. G [Feinman, J., Mar. 6, 2006 order, Feb. 2, 2006 stipulation].) The Medical Board subsequently reviewed the applications by petitioner and the Police Commissioner, along with new medical evidence, three more times between 2006 and 2008. (Petition, Exs. I, K, L.) Ultimately, after examining petitioner, reviewing his medical records, and evaluating the reports of doctors who examined him, the Medical Board, by a determination dated April 17, 2009, recommended disapproval of petitioner's application for ADR benefits and the Police Commissioner's application for ODR benefits. (Petition, Ex. T.) On July 8, 2009, the Board of Trustees concurred with the Medical Board's recommendation. (Answer, Ex. 29.) Petitioner now seeks to have this determination annulled.

The award of ADR benefits to an applicant involves a two-step process. (Matter of Borenstein v New York City Empls. Retirement Sys., 88 NY2d 756, 760 [1996].) "After conducting its own medical examination of the applicant and considering the evidence submitted in support of the claim, the Medical Board, as a threshold matter, must certify whether the applicant is actually physically or mentally incapacitated for the performance of city-service. If the Medical Board concludes that the applicant is disabled, it must then make a recommendation to the Board of Trustees as to whether the disability was a natural and proximate result of an accidental injury received in such city-service." (Id. [internal citations and quotation marks

omitted].) The second step in the process involves a review of the Medical Board's recommendation by the Board of Trustees. "If the Medical Board certifies that the applicant is not medically disabled for duty, the Board of Trustees must accept that determination and deny applicant's claim. The Board of Trustees is equally bound by a Medical Board finding that the applicant is disabled, but in that event it must then make its own evaluation as to the Medical Board's recommendation regarding causation." (Id. [emphasis in original].)

It thus is well settled that the Board of Trustees is bound by the Medical Board's determination of whether an applicant for disability benefits has a disability. (See id.; Matter of Canfora v Bd. of Trustees, 60 NY2d 347 [1983].) Moreover, "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.'" (Matter of Borenstein, 88 NY2d at 760.) Where the medical evidence is conflicting, it is solely within the province of the Medical Board to resolve the conflict. (Id. at 761; Matter of DeNaro v New York City Empls. Retirement Sys., 265 AD2d 215 [1st Dept 1999], lv denied 95 NY2d 769 [2000].) The courts "cannot weigh the medical evidence" (Matter of Santoro v Board of Trustees of New York City Fire Dept. Art. 1-B Pension Fund, 217 AD2d 660 [2d Dept 1995]), or "substitute its own judgment for that of the Medical Board." (Matter of Borenstein, 88 NY2d at 761 [internal brackets omitted].)

In reaching its determination, the Medical Board is bound by New York City Administrative Code § 13-252. Section 13-252 provides that the Board shall retire a police officer with ADR benefits if he or she is physically incapacitated for the performance of city-service as a result of an accidental injury received during such service that is not the result of his

or her own “willful negligence.” The Board is also obligated to follow certain procedures, entitled Instructions for the Medical Board upon Receipt of Application for Accident Disability under Administrative Code B18 43.0 (“Instructions”). Section five of the Instructions states in pertinent part that “if the Medical Board disagrees with a report submitted by another physician, the Medical Board should briefly explain why it does not accept the outside physician’s conclusion.” (Petition, Ex. W [emphasis in original].)

Petitioner contends that, in its April 17, 2009 report, the Medical Board failed to articulate a reason for rejecting the conclusions of petitioner’s treating physicians. Petitioner therefore seeks an order remanding his case to respondents for further consideration, and also requests that the court issue a directive requiring a different Medical Board to consider his case.

In its April 17, 2009 evaluation of petitioner, the Medical Board considered new evidence that petitioner presented regarding his injuries. This evidence, which the Medical Board summarized at length, included an office note by Dr. Michael Shapiro, dated April 14, 2008, which gave an impression of “cervical discogenic syndrome, cervicgia, cervical radiculopathy, lumbago and lumbar radiculopathy,” with a recommendation of spine surgery and exercise. (Petition, Ex. T, ¶ 7.) The Board also reviewed the pre- and post-operative reports relating to petitioner’s surgery which occurred on September 23, 2008. In his reports, Dr. Shapiro diagnosed petitioner with L5-S1 lumbar herniated disc, back pain, and radiculopathy (Answer, Ex. 66), and performed surgery which included spinal fusion and bone grafts. (Id.)

The Board also reviewed medical reports and physician notes which documented petitioner’s progress and treatment after the surgery. The Board noted that Dr. Shapiro stated in a follow-up note to the surgery, dated October 6, 2008, that “[t]he patient’s problem was a result of no known injury with a sudden onset” and recommended a home exercise program. (Id., Ex.

65.) In subsequent follow-up notes dated between October 27, 2008 and March 23, 2009, Dr. Shapiro reported improvement in petitioner's condition, and recommended physical therapy and exercise, along with medication for pain. (See id.)¹ Dr. Shapiro's assessment during this period included lumbago and status/post spinal fusion. (See id.) Dr. David Zaret, in a report dated December 4, 2008, assessed a newly arising condition of petitioner's ankle as osteochondritis of the talus, and recommended weight bearing, ice treatment, and physical therapy. (Id., Ex. 68.)

At his April 17, 2009 evaluation, petitioner stated that his elbow symptoms, including recent surgery, and ankle pain were not related to any line of duty injuries; that a steroid injection to his right ankle on March 30, 2008 and a spine fusion had helped him; that he was still taking oxycodone; that his shoulders are "not bad" and that if "this were for only his shoulders, they would not preclude him from functioning as a full duty police officer." (April 17, 2009 Medical Board Report, ¶ 27.)

The Medical Board also performed a physical examination of petitioner on April 17, 2009. The Board found that the officer was able to walk unassisted with no appreciable limp; that the evaluation of his neck revealed normal alignment and a full range of motion without any pain; that he was able to lift both arms "symmetrically fully"; that his ability to reach behind his back was somewhat restricted, and the range of motion of the back was "mildly restricted"; that his lower back was non-tender; and that while his reflexes were symmetrical, he demonstrated "significant voluntary guarding on the right side with reinforcement." The Board further found that petitioner did not exhibit any evidence of motor deficit or sensory loss. (Id., ¶ 28.)

¹Petitioner argues that the Medical Board incorrectly relied on Dr. Shapiro's note stating that petitioner's condition "was the result of no known injury." While petitioner is correct that other notes by Dr. Shapiro indicate that petitioner claimed that the condition was work-related (see Answer, Ex. 65), Dr. Shapiro's notes nevertheless remain significant to the extent that they indicate that petitioner's condition was improving.

After reviewing these records and conducting the physical examination of petitioner, the Board held that, “[i]n view of the minimal restriction of mobility of the lower back and the normal and sensory examinations . . . , there are no significant objective findings precluding the officer from performing the full duties of a New York City Police Officer.” (*Id.*, ¶ 30.) The Board also concluded that the lumbar fusion was for a degenerative lumbar spine. (*Id.*, ¶ 29.)

While petitioner underwent a serious fusion surgery, petitioner’s own medical reports showed that his condition was improving, and the Board’s examination indicated that petitioner had only minimal restriction of mobility. Moreover, in its prior reports, the Medical Board reviewed medical evidence submitted by petitioner of various conditions, including disc protrusions and cervical and lumbar radiculopathy. The Board consistently found, however, that petitioner’s physical examinations did not corroborate a finding of disability based on these conditions. (See e.g. Medical Board Reports of Apr. 12, 2002, ¶ 5; April 11, 2003, ¶ 7; Feb. 13, 2004, ¶ 19; Mar. 16, 2007, ¶ 10; Mar. 21, 2008, ¶ 18.) The Board also repeatedly found significant or subjective “guarding” or exaggeration of symptoms, on petitioner’s part, during the examinations. (Apr. 12, 2002, ¶ 4; April 11, 2003, ¶ 6; Feb. 13, 2004, ¶ 18; Mar. 16, 2007, ¶ 10; Mar. 21, 2008, ¶ 18.)


The above evidence constituted, at the least, “some credible evidence” on which the Medical Board relied for its finding that petitioner was not disabled for police duty. In so holding, the court finds that this is not a case in which the Medical Board failed to carefully examine the medical evidence submitted by petitioner or to explain the reasons for its determination that there were insufficient objective physical findings to support petitioner’s claim of disability as a result of a line of duty accident. On the contrary, in this court’s experience, the Board’s reports were more thorough than is the Board’s norm, and extensively

discussed petitioner's physicians' reports and diagnostic evidence, and its own physical findings and conclusions. To the extent that there was conflicting medical evidence as to whether petitioner could resume his normal police duties, it was for the Medical Board, not the court, to weigh this evidence. (See Matter of Borenstein v New York City Empls. Retirement Sys., 88 NY2d 756, supra.) Thus, the Board of Trustees' determination of July 8, 2009, based on the Board's recommendation, should be upheld.

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
September 24, 2010



MARCY FRIEDMAN, 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).