

Matter of Redgrave v Kelly

2010 NY Slip Op 33693(U)

December 27, 2010

Sup Ct, NY County

Docket Number: 115487/09

Judge: Paul Wooten

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

See #
001

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of
ROBERT REDGRAVE,
Petitioner,

115487/09

INDEX NO. ~~117441/09~~

-against-

MOTION DATE _____

For a Judgment Pursuant to the Provisions of Article 78
of the New York Civil Practice Law and Rules,

MOTION CAL. NO. _____

**RAYMOND KELLY, as the Police Commissioner
of the City of New York and the 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;**

FILED

JAN 20 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Respondents.

The following papers, numbered 1 to 3 were read on this motion by petitioner(s) for an order and judgement pursuant to Article 78 of the Civil Practice Law and Rules reversing, annulling and setting aside the decision and finding of the Board of Trustees of the Police Pension Fund of the New York City Police Department.

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) _____

2

Replying Affidavits (Reply Memo) _____

3

Cross-Motion: Yes No

In this Article 78 proceeding, petitioner, Robert Redgrave, a retired New York City Police Officer, after 20-years of service, seeks an order reversing, annulling and setting aside the July 8, 2009 determination of the Board of Trustees of the New York City Police Department Pension Fund (Board of Trustees) adopting the determination by the Medical Board of the New York City Police Department Pension Fund (the Board), denying petitioner's Accident Disability Retirement (ADR) claim pursuant to the Administrative Code § 13-252.1 (WTC Presumption

* 2]

Law). Petitioner timely filed this action on November 2, 2009, and asserts that his medical evidence submitted in support to the Board, as well as the Board's independent medical examinations prove that the petitioner was disabled from performing the duties of a New York City Police Officer.

The respondents oppose the Article 78 application, proffering that the petitioner failed to meet his burden to show that he was physically incapacitated from his performance of the duties of a New York City police officer.

For the reasons set forth below, the petition is denied.

BACKGROUND

Petitioner, a NYPD officer, became a member of the New York City Police Officer's Pension Fund (PPF) on January 6, 1984. He worked while a member of the PPF until his retirement on April 2004 with service retirement benefits. On September 11, 2001, and for a few weeks thereafter petitioner was assigned to the World Trade Center Disaster Rescue, Recovery and Clean-Up Operations. Shortly thereafter, petitioner was diagnosed, among other things with chronic sinusitis, nasal airway obstruction and nasal septal deformity. (See medical reports, Michael Shohet, M.D., December 2, 2003 and Peter Som, M.D., June 20, 2005.) On October 20, 2005, petitioner underwent bilateral endoscopic sinus surgery at Mount Sinai Medical Center, which corrected his post nasal drip, nasal congestion and facial pain. (See Surgical Medical Report, defendants' exhibit 23.)

On July 24, 2006, petitioner filed an ADR application, claiming that he was disabled from performing police duties due to certain medical conditions caused by his participation in the World Trade Center Rescue, Recovery and Clean-Up Operations. These conditions included cancer of the appendix, a benign growth in petitioner's lung and chronic sinusitis and

related symptoms. (See application for disability retirement, defendants' exhibit 4.) On May 18, 2007, the PPF Medical Board interviewed and examined the petitioner and thereafter the Medical Board denied his application for ADR and the Police Commissioner's application for Ordinary Retirement Benefits (ODR). The Medical Board concluded that the petitioner's cancer was successfully treated and is not recurrent, the lump in the lung is benign and unchanged over time and, that petitioner's sinus surgery was successful.

On March 20, 2008, petitioner requested that the Board of Trustees reconsider the petitioner's ADR application under the WTC Presumption Law. On March 21, 2008, the Medical Board examined the petitioner and again recommended to the Board of Trustees disapproval of the petitioner's ADR and ODR retirement benefits.

On October 7, 2008, petitioner requested that the matter be referred to the Medical Board. On November 4, 2008, Dr. Michael Shohet administered a Smell Identification Test and concluded that the petitioner was able to identify only 6 out of 40 smell questions in the test and suffered severe anosmia. (See Dr. Shohet's Report dated February 26, 2009, respondents' exhibit I.) On February 27, 2009, the Medical Board considered the recent medical records, examined the petitioner and again recommended disapproval of the petitioner ADR and ODR retirement benefits. The Board wrote:

It is the opinion of the Article II Medical Board that although Detective Redgrave has documented loss of smell, he dates this to 2002 when he was still working in Narcotics as a Police Detective and that it did not interfere with his ability to perform his job at that time....." (See Medical Board Report dated February 27, 2009, respondents' exhibit j ¶ 9)

Subsequently on July 8, 2009, respondents again denied petitioner's ADR and ODR application. The Board of Trustees determined that petitioner was not physically disabled for the purpose of performing city-service. On July 8, 2009, the Trustee's stated, "Detective Redgrave apparently has suffered a loss of smell as a result of the World Trade Center exposure".... "and

[* 4]

more importantly, we don't test [NYPD] candidates for sense of smell, its not a requirement for the NYPD and we are denying the request for a third remand." (See Board of Trustee's, July 8, 2009, transcript, respondents' exhibit 15)

Thereafter, the petitioner timely filed an Article 78 action challenging the respondents' findings and determination denying his Accident Disability Retirement (ADR) claim pursuant to the Administrative Code § 13-252.1. Petitioner alleges that while his sinus surgery did improve his sinus condition, his loss of smell qualifies him for an ADR pension because it's a physical disability preventing him from performing city-service. Petitioner proffers that a sense of smell is a NYPD job requirement and not the respondents denial is arbitrary and capricious. Petitioner submits the Notice of Examination for the NYPD Police Department Exam, which states "WHAT THE JOB INVOLVES:...detecting odors such as those caused by smoke or gas leaks" (See petitioner's rely memorandum, Appendix A, ¶ 2)

Here, petitioner does not dispute the respondents' determination based on the medical evidence submitted, rather concedes and accepts all medical facts as stated therein. Petitioner questions whether the Medical Board's interpretation that his loss of the sense of smell (in 2002 and while still working for the NYPD through his retirement in 2004) disqualifies him from the ADR pension, because a loss of the sense of smell is not a physical disability preventing him from performing city-service, namely his job as a NYPD police detective. As the question presented concerns the interpretation of law, transfer to the Appellate Division is not required (see *Matter of Rosenkrantz v McMickens*, 131 AD2d 389, 390 [1st Dept 1987]; *Matter of Robinson*, 194 Misc 2d at 64, citing *Matter of Duboff Elec., Inc. v Goldin*, 95 AD2d 666 [1st Dept 1983]).

In an article 78 proceeding challenging a disability determination, the Medical Board's finding will be sustained unless it lacks a rational basis, or is arbitrary or capricious (see, *Borenstein v. New York City Employees' Retirement System*, 88 NY2d 756, 673, 650 NYS2d

[* 5]

614, [1996]; *Matter of Canfora v Board of Trustees*, 60 NY2d 347, 351 [1983]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230-231 [1974]). "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]." *Borenstein*, 88 NY2d 756, 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, 659 NYS2d 215, [1997].

Here, the Medical Board proffers that its credible evidence establishes (after its medical expert examination) that while petitioner suffered a loss of smell in 2002, this loss of smell did not effect his ability to perform the duties of a Narcotic Division, police detective from 2002 through his retirement in April 2004. Thus, while the "loss of smell as a result of the World Trade Center exposure¹" may cause petitioner a physical disability, he doesn't suffer a physical disability that actually incapacitated him for the performance of city service, see *Matter of Borenstein*, supra. Petitioner fails to submit any evidence in response to this portion of the Medical Board's conclusion. Accordingly, Petitioner's allegation that respondents' actions were arbitrary, capricious and an abuse of discretion are unfounded. As such, the court holds that the respondents' decision was not arbitrary and capricious and must be upheld.

For these reasons and upon the foregoing papers, it is,

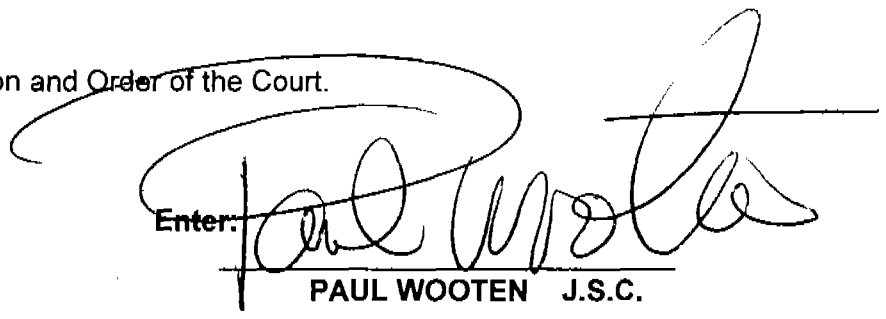
¹See Board of Trustee's, July 8, 2009, transcript, respondents' exhibit 15.

ORDERED that petitioner's Article 78 petition is denied and the proceeding is dismissed, without costs on disbursements to respondents.

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2010

Enter: 
PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE