

**Agnelli v Kelly**

2010 NY Slip Op 34071(U)

October 12, 2010

Supreme Court, New York County

Docket Number: 103357/09

Judge: Louis B. York

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. LOUIS B. YORK  
Justice

PART 2

EC  
10/19/10  
ec

-----X  
In the Matter of the Application of  
**ANTHONY AGNELLI**,  
Petitioner,  
For a Judgment Under Article 78 of the Civil Practice  
and Rules

103357/09

Index No. ~~106373/07~~  
Motion Date 12/13/06  
Motion Seq. No. 001  
Motion Cal. No. \_\_\_

-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**,

NYS SUPREME COURT  
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Respondents,  
-----X

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for Article 78

NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion: [ ] Yes [X] No

This is the second time that this petitioner has brought an Article 78 Proceeding seeking to annul a determination of the Police Department Board of Trustees. On the first occasion, I found that the respondent had not taken certain facts into consideration. This time I am remanding back to the respondent with a direction to grant the petitioner accident disability retirement benefits in accordance with Administrative Code §13-252.

Petitioner, a retired veteran police officer has been denied accident disability retirement benefits (also referred to as "line-of-duty" benefits), claims resulted from injuries he received on the job. He suffers from disabling vertigo.

The record reveals that in 2000, he fell when stairs collapsed beneath him, after which he suffered from dizziness. According to his petition, in 1990 he was punched in the head and punched in the neck and back during an arrest. Previously in 1990, he was punched and kicked while making an arrest. In 1991, he was punched and kicked to the ground, injuring his neck during an arrest. In 1992, he injured his neck in a collision while pursuing a person armed with a gun. In 2003, he fell while climbing a fence, immediately after which he experienced a vertigo-type dizziness and drove his car off the road while traveling home.

As a result of these line-of-duty incidents, petitioner was diagnosed as suffering from extensive head and neck injuries and symptomology. His otolaryngologist's opinion was that these injuries were the cause of his vertigo. His spinal surgeon diagnosed his condition as cervical spondglosis, which causes vertigo-like symptoms.

In its first review of petitioner's symptoms, the Medical Board found that petitioner was suffering from vertigo, but determined that its origin was unknown. It found that it was not caused by any of the line-of-duty injuries without explaining the basis for such a conclusion. In granting a request for reconsideration, the Medical Board held that although

the petitioner was suffering from vertigo, which disabled him from performing his duties, they opined that there was no connection between his disability and the accidents he suffered from in the line of duty.

This last determination was brought before this Court *via* an Article 78 petition. After considering all of the evidence, I remanded to the respondents, directing them to consider whether the petitioner had a condition which was exacerbated by the line-of-duty accidents that the petitioner suffered from. Once again, the board reiterated that there was no connection between his prior accidents and his vertigo symptoms without explaining on what basis the Board found these symptoms unrelated. After reconsideration, the Board once again determined that petitioner's vertigo was not caused by any injuries incurred on the job and continued to award him ordinary disability. It is this Court's understanding that the Board of Trustees has consistently accepted the Medical Board's determination of no link between petitioner's line-of-duty accidents and his disabling vertigo.

The statutory set up for determining retirement pension benefits can be found in Administrative Code Sections 13-252 and 251. Pursuant to these sections, petitioner can be awarded Accident Disability Retirement Benefits for disability resulting from injuries in the line of duty or ordinary disability pension benefits for disability resulting from disability injuries acquired outside of the line of duty.

The Medical Board's determination of a condition disabling petitioner from continuing to perform his duties is binding upon the Board of Trustees. However, whether the disability was caused by injuries in the line of duty is the sole responsibility of the Trustees. They can either accept the Medical Board's recommendation or choose to ignore it (*Borenstein v City Employees Retirement System*, 88 NY2d 756 [1996]). In this instance, the trustees have ~~unanimously~~ accepted the Medical Board's recommendation by a tie vote, thereby relegating petitioner to the inferior pension benefits of ordinary disability. They have ignored this Board's directive to consider whether petitioner's injuries precipitated a latent condition or exacerbated a pre-existing condition, relying on their own doctor's speculation that there was no connection between his condition and his line of duty injuries. They have ignored the prevailing understanding of the medical profession and petitioner's doctors that cervical injuries, such as occurred here, can indeed have caused plaintiff's injuries, or aggravated a pre-existing condition, and have, therefore, violated the clear holding of *Tobin v Steisel*, 64 NY2d 254 [1985]. [Aggravation of a pre-existing condition or precipitating a latent condition is a basis for accident disability benefits.]

While *Meyer v New York Board of Trustees*, 90 NY2d, 139, 659 NYS2d 215 [1997]; and *Borenstein v City Employees Retirement*, 88 NY2d 756 [1996], establish a heavy burden on petitioner and, therefore, this Court of overcoming a decision by the Medical

Board and the Board of Trustees, nevertheless, their reliance by the respondent as being the final word on petitioner's eligibility for accident disability benefits is misplaced. Both *Meyer* and *Borenstein* indicate that where there is no rational basis because of the lack of any

credible evidence supporting such a determination, the decision may be annulled. Furthermore, there is precedent in the First Department in deciding as a matter of law that respondent's determinations were not supported by credible evidence requiring respondent to award accident disability benefits (*See, eg, Cusik v Kerik*, 305 AD2d 247 [1<sup>st</sup> Dept 2003]; *lv. to app. Den.* 100 NYS2d 511 [2003]; *Liston v City of New York*, 161 AD2d 491, 55 NYS2d 757 [1<sup>st</sup> Dept 1990], *app. den.* 76 NY2d 709 [1990]).

Here, this matter has been before the respondent at least four times, always with the same result denying benefits in accordance with the Medical Board's recommendations. This Court now chooses to break the recent 4-4 deadlock of the trustees, breaking the tie by casting its vote to grant the petition and awards the petitioner the retroactive benefits he is entitled to.

Accordingly, it is

**ORDERED** and **ADJUDGED** that the petition is granted and the determination of the respondent is annulled; and it is further

**ORDERED** and **ADJUDGED** that this matter is remanded to the respondent, who must grant the petitioner accident disability benefits retroactive to the time that he retired from his service in the Police Department.

Dated: October 12, 2010

Enter:

*Lly*  
\_\_\_\_\_  
Louis B. York, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**  
*[Signature]*  
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**FILED**  
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