

Matter of Beirne v Kelly

2011 NY Slip Op 30333(U)

February 10, 2011

Sup Ct, New York County

Docket Number: 111704/2010

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 111704/2010
BEIRNE, THOMAS
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 1/12/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1-3
4-5

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 decided
by the annexed memoranda, decision, order and 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: 2/10/11

[Signature]
JANE S. SOLOMON, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 55

In the Matter of the Application of
THOMAS BEIRNE,
Petitioner,

INDEX NO. 111704/2010
DECISION, ORDER and
JUDGMENT

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 and THE BOARD OF TRUSTEES
of the Police Pension Fund, Article II,
NEW YORK CITY POLICE DEPARTMENT

Respondents.

JANE S. SOLOMON, J.:

In this CPLR article 78 proceeding, petitioner Thomas
Beirne (Petitioner), a former police officer of the New York City
Police Department (NYPD), seeks judicial review of a
determination by respondents 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 (the
Board of Trustees) denying his application for an accident
disability retirement (ADR) allowance.

BACKGROUND

Petitioner was appointed to the NYPD on July 15, 1986,
and assigned as an underwater photographer (Petition, Ex. B). He

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was a member of the Police Pension Fund (Pension Fund). Effective February 21, 2007, Petitioner retired from the NYPD on a service retirement pension (Answer, Ex. 10).

During his career, Petitioner suffered several Line of Duty (LOD) injuries to his shoulders and back (October 17, 1988, April 4, 1991, September 7, 1991, October 11, 1994 and July 12, 1996) (Answer, Ex. 2). In 1997, arthroscopic surgeries were performed on Petitioner's left and right shoulders (Petition, Ex. A). In 1996 and 2003 Petitioner filed applications for ADR (Answer, Ex. 3). The Medical Board of the Pension Fund examined Petitioner and his medical records. It determined that his injuries did not warrant classifying him as disabled (Answer, Ex. 4) and his application was denied by the Board of Trustees (Answer, Ex. 6).

On February 3, 2006, while assigned to the NYPD Harbor Unit, Petitioner slipped on "marine growth" upon exiting the water after a training session. He fell and injured his right shoulder (Answer, Ex. 7). He had an MRI on February 22, 2006 (Petition, Ex. C), and, on April 20, 2006, he had arthroscopic surgery to repair tendinitis and a "massive rotator cuff tear" (Petition, Ex. E). Due to continued pain and loss of mobility, on December 29, 2006, petitioner again applied for ADR. The Medical Board examined Petitioner on April 28, 2008 and unanimously determined that "there are no significant objective

findings precluding the officer from performing the full duties of a New York City Police Officer . . ." (Petition, Ex. H). It recommended disapproval of both the ADR and ODR applications.

The Board of Trustees twice voted to remand the application to the Medical Board because of new evidence (Answer, Ex. 12, 14). The Medical Board reviewed the material each time and reaffirmed its decision (Answer, Ex. 13, 15). On May 12, 2010, the Board of Trustees denied Petitioner's request for a third remand and denied both the ADR and ODR applications (Answer, Ex. 16, 17). This petition followed.

DISCUSSION

In order to qualify for ADR, a member of the Pension Fund must be "physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member" (Administrative Code of the City of New York [Administrative Code] § 13-252).

The determination as to whether a Pension Fund member is entitled to ADR is a two-step process (see *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). First, the Medical Board must determine whether the member is unable to physically or mentally perform his or her job (*id.*; see also Administrative Code § 13-223 [b]). If there is a finding of disability, the Medical Board then must

make a recommendation to the Board of Trustees as to whether it was a natural and proximate result of a service-related accidental injury (*Matter of Borenstein*, 88 NY2d at 760).

The Medical Board's determination of disability is binding on the Board of Trustees (see e.g. *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y.*, Art. II, 60 NY2d 347, 351 [1983]; see also *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 144 [1997]). The Medical Board's recommendation on the issue of causation is not binding, and the Board of Trustees is ultimately responsible for determining causation (see e.g. *Matter of Meyer*, 90 NY2d at 144).

Petitioner argues that the Medical Board violated its rules because it did not sufficiently articulate the rationale behind its denial of his ADR status or explain the evaluations they performed, and failed to comment on Petitioner's doctors' opinions. In support of this he cites to the instructions attached to the ADR application form, which states "[i]f 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." Respondents contend that the Medical Board's determination is supported by credible evidence, and must be upheld.

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 (*Matter of Borenstein*, 88 NY2d at 760). As long as the Medical Board's determination is based on some credible evidence, it should not be disturbed (*id.* at 760; see also *Matter of Canonico v Kelly*, 38 AD3d 444, 445 [1st Dept 2007]). A reviewing court may not weigh the medical evidence or substitute its judgment for that of the Medical Board (*Matter of Borenstein*, 88 NY2d at 760), and "conflicting medical opinion provides no occasion for judicial interference" (*Muffoletto v. NYC Employees' Ret. Sys.*, 198 AD2d 7, 7 [1st Dept 1993]).

Here, the Medical Board reviewed the reports of Petitioner's doctors and evaluated Petitioner three times. The first review included a discussion of Petitioner's personal doctor's findings and an interview and examination of Petitioner. In the interview, Petitioner stated that he had not been seeing a doctor since he retired, nor had he received any physical therapy. He complained of momentary pain in his shoulder with motion or when lifting, but was not taking any pain medication (1st Medical Board Exam, attached to Answer, Ex. 11, ¶ 15). The examination found that the left shoulder appeared to be entirely normal, while the right shoulder had some motion limitations and pain (*Id.*, at 16). However, muscle strength was normal and no shoulder instability was found (*Id.*).

Based on the foregoing, the Medical Board made the following determination:

After having reviewed the history of the injury, his most

recent injury and subsequent treatments, the surgery of 2006, and subsequent treatments, the present symptomatology and today's physical examination, it is the opinion of the Article II Medical Board that there are no significant objective findings precluding the officer from performing the full duties of a New York City Police Officer.

(*Id.*, at 17).

The second exam addressed new evidence, including a November 10, 2008 letter from Dr. Stephen O'Brien, Petitioner's doctor (attached to Answer, Ex. 18).¹ The Board disagreed with Dr. O'Brien's findings that "the officer was 100% disabled" based on its own medical evaluation and an interview where Petitioner stated that he had some pain and discomfort, but he was "presently working in loss prevention at Walmart" (2nd Medical Board Exam, attached to Answer, Ex. 13, ¶ 5-7).

The third exam addressed additional new evidence consisting of a report dated May 4, 2009, from Dr. Maurizio Cibischino, an orthopedic surgeon (Answer, Ex. 25), and a letter from Petitioner's attorney (attached to Answer, Ex. 19). The Cibischino report reiterated Petitioner's injury history, reported pain and limited movement commensurate with the evidence

¹ Dr. O'Brien's letter reads in its entirety:
 "This letter will serve to verify that [Petitioner] is under my care for his right shoulder.

On July 19, 2006, [Petitioner] underwent an arthroscopy, rotator cuff repair and biceps transfer to the right shoulder. Post-operatively, he followed a physical therapy program to rehabilitate his shoulder.

Please be advised that [Petitioner] is 100% disabled for his line of duty. I feel that the patient would put himself and his colleagues at risk should he be called upon in the line of duty."

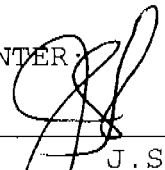
already before the Medical Board, and based on that evidence, determined "if he were placed [in] a life or death situation which would require full function of both his shoulders, I would have great concern that he would not be able to perform well." After reviewing the minutes from the prior examinations, and the new date, the Medical Board reaffirmed its prior decision.

The Medical Board properly investigated and examined Petitioner's claims. It is not required to credit those opinions (*Matter of Canonico, supra*, 38 AD3d at 445). Based on its examination and reviews, the Medical Board's decision that Petitioner was not entitled to ADR is supported by credible evidence (*Matter of Borenstein*, 88 NY2d at 760). A review of the three Medical Board reports also lays bare Petitioner's claim that the Medical Board did not sufficiently address his personal doctor's opinions.

Accordingly, it hereby is

ORDERED and ADJUDGED that the petition is denied.

Dated: ~~January~~ February 10, 2011

ENTER


J.S.C.

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