

Matter of Damian v Kelly
2011 NY Slip Op 30531(U)
March 1, 2011
Supreme Court, New York County
Docket Number: 108355/2010
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ANIL C. SINGH

PART 61

Index Number : 108355/2010

DAMIAN, KIM

vs

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3, 4, 5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

the petition is decided in accordance with the annexed decision and order.

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

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: March 1, 2011

Recs
HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

and proximate result of an accident sustained in the line of duty.

Petitioner maintains that she has severe lower back pain with nerve involvement as a result of line of duty injuries. On June 27, 2004, she was injured struggling with an emotionally disturbed person and taken to the Emergency Room with back pain. On May 20, 2005, she was in an on-the-job motor vehicle accident, which caused neck and lower back injuries. Diagnostic testing showed that she had suffered a disc herniation at L5-S1 with nerve involvement.

In 2007, Damian made an application for a line of duty disability because of lower back pain. While her application was pending, Damian states that she sustained additional line of duty back injuries on October 25, 2008, June 14, 2009, and February 24, 2009. Spinal surgery was recommended by NYPD and independent surgeons.

On October 7, 2009, the Pension Fund Medical Board ("Medical Board") found that Damian was disabled due to a neurogenic areflexic bladder and recommended approval of ordinary disability retirement. This finding was based on a diagnosis by Damian's urologist, Dr. Zafar Khan.

Damian complained of mid-back pain that radiated bilaterally and numbness of the entire left leg. Additionally, Damian complained of posterior cervical pain and radiating neck pain. The Medical Board disapproved Damian's application for

line of duty accident disability pension. This finding was based on a review of medical documentation as well as a physical examination of Damian. According to the Medical Board, petitioner had a "very slow deliberate gait." She walked within normal limits. "The range of motion of the cervical spine was within functional limits accompanied by grimacing in all planes." Tenderness was noted in the lumbar spine. The examination revealed that Damian had a "diminished ability to invert and evert" on the left side when compared to the right side. Further, she was unable to fully flex the small toes of the left foot. It concluded:

The Medical Board also notes that it has reviewed the most recent imaging study of the lumbosacral spine and recognizes no pathology that would explain neither the areflexic bladder nor the perceived difficulty in eversion of the left foot flexion and flexion of the small toes. The Medical Board notes that there are no lower extremity reflex changes nor any atrophy of the lower extremity.

Thereafter, petitioner by letter dated December 1, 2009, accepted ordinary disability retirement and requested that her accident disability application remain open and for remand to the Medical Board "for further consideration and discussions of causation." Petitioner maintains that her neurogenic bladder condition is related to her lower back injury.

Subsequently, on February 26, 2010, the Board of Trustees voted six to six to deny petitioner accident disability. In its minutes, the Board stated: "We have reviewed everything. We discussed the case as well with Dr. Kleinman. And we

are denying the upgrade. We are ultimately agreeing with the Medical Board's determination and at this time we have to deny the upgrade."

Discussion

The Medical Board's disability determination may not be overturned if it is based on substantial evidence which requires a determination on "some credible evidence" (Borenstein v. New York City Employees' Retirement System, 88 NY2d 756, 761 [1988]).

In a case such as this one where the Medical Board concludes that the applicant is disabled, "it must further determine whether the disability is a natural and proximate result of an accidental injury received in such city-service and certify its recommendation on this issue to the Board of Trustees, the body ultimately responsible for retiring the pension fund member and determining the issues of service-related causation." Meyer v. Board of Trustees of the New York City Fire Department, 90 NY2d 139, 145 (1997) (other citations and internal quotations omitted).

This court "may not set aside the denial of accidental disability retirement resulting from a tie vote unless it can be determined as a matter of law on the record that the disability was a natural and proximate result of a service-related injury." Meyer, 90 NY2d at 146 (other citations and internal quotations omitted).

Here, the first issue is whether Damian suffered from a spinal disability as a result of line of duty injuries to her back which prevented her from performing her responsibilities as a police officer. The second issue is whether Damian's bladder condition was caused by her line of duty spinal injuries.

There is some credible evidence in support of the Medical Board's determination that Damian did not suffer from a back disability. After her encounter with the emotionally disturbed person, x-rays were taken of Damian's lumbar spine on June 27, 2005. The radiologist found that the lumbar bones were "normal" and that there were "no acute fractures or dislocations." Nor did the August 10, 2004 MRI of the lumbar spine reveal disc herniation.

Diagnostic testing was conducted after Damian's May 20, 2005 motor vehicle accident. X-rays of the lumbar spine dated May 25, 2005, and of the thoracic spine dated June 13, 2005, were normal.

This testing is contradicted by other testing, including MRIs of the lumbar spine taken on August 18, 2005, and a May 25, 2007 MRI showing a disc herniation at L1-S1. The latter MRI showing that the disc herniation had gotten worse. An EMG conducted on January 12, 2009, showed bilateral L-5 radiculopathy. Additionally, Damian's treating physician, Dr. Jeffrey D. Klein, states in a report dated January 21, 2009, that an MRI of Damian's spine reveals

disc herniation at L5-S1 “but with no significant neural compression.”

The Medical Board examined Damian on September 19, 2007, December 5, 2007, May 21, 2008 and November 5, 2008, concluding that the “documentary and clinical evidence fails to substantiate that the officer is disabled from performing the full duties of a New York City Police Officer.” Similarly, in the October 7, 2009 examination discussed above (at pages 2-3), the Medical Board concluded after examining Damian that she was able to walk normally and that her cervical range of motion was within normal limits.

On this record, the Medical Board’s determination that Damian did not suffer from a back disability was not arbitrary or capricious. While there is conflicting evidence on this issue, the Medical Board has the right to resolve the conflict (D’Angelo v. Ward, 159 A.D.2d 425, 426 [1st Dep’t 1990]).

The Board of Trustees vote to deny petitioner accident disability appears to be based on a statement in the Medical Board’s October 7, 2009 report that there is no pathology that would explain the areflexic bladder.

In fact, petitioner submitted two reports to establish a connection between her back condition and neurogenic bladder. First, Damian submitted a letter to the Board of Trustees from her urologist, Dr. Khan, dated December 15, 2009. Dr. Khan opines that Damian “has a neurogenic bladder which can obviously occur

after any spinal cord injury not necessarily involving lumbar nerves that is involving the legs. It can be a selective injury to the sacral third nerve which supplies the bladder.... There is a huge body of research available and in fact clinical application of the fact”

A letter dated January 7, 2010, was submitted from Dr. Teresa Esposito, who opined that Damian has neck and back injuries with numbness in both her legs. The symptoms cause pain and radiculopathy. Damian began having urologic symptoms, including stress incontinence. She was diagnosed with a neurogenic bladder. Dr. Esposito opined that “[a]ll of Ms. Damian’s symptoms are related to her injury that she sustained at work in 2005.”

Moreover, respondents in their brief at page 13 define a neurogenic bladder as “a urinary problem in which the bladder does not empty properly due to a neurological condition.” The causes of the condition include “disorders to the central nervous system, Alzheimer’s disease, meningomyelocele, brain or spinal cord tumors, multiple sclerosis, Parkinson disease, spinal cord injuries, and stroke recovery; and damage or disorders to the peripheral nerves including: alcoholic neuropathy, diabetic neuropathy, nerve damage due to pelvic surgery; **nerve damage from herniated disc**” (emphasis added). Here, petitioner’s claim is that her neurogenic bladder condition was caused by a line of duty injury to her back

which resulted in a herniated disc with nerve involvement.

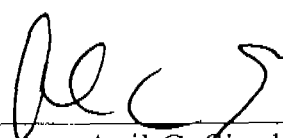
The Board of Trustees reached its determination that there was no casual connection between petitioner's back condition and her neurogenic bladder without any discussion on the record regarding the evidence before it, including the fact that Damian has a herniated disc, and the reports by Dr. Khan and Dr. Esposito. Petitioner is entitled to a full and fair review of her request for a line of duty accident disability pension.

Petitioner urges that this court can find as a matter of law that her neurogenic bladder was the natural and proximate cause of a service related accident. I disagree. The fact that Damian has a herniated disc is not sufficient to establish a casual connection between line of duty injuries to her back and her bladder condition.

ORDERED AND ADJUDGED that the petition is granted to the extent of remanding this matter to the Board of Trustees for a re-hearing on petitioner's application for a line of duty disability pension.

The foregoing constitutes the decision and judgment of the court.

Date: March 1, 2011
New York, New York



Anil C. Singh

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**

UNFILED JUDGMENT

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